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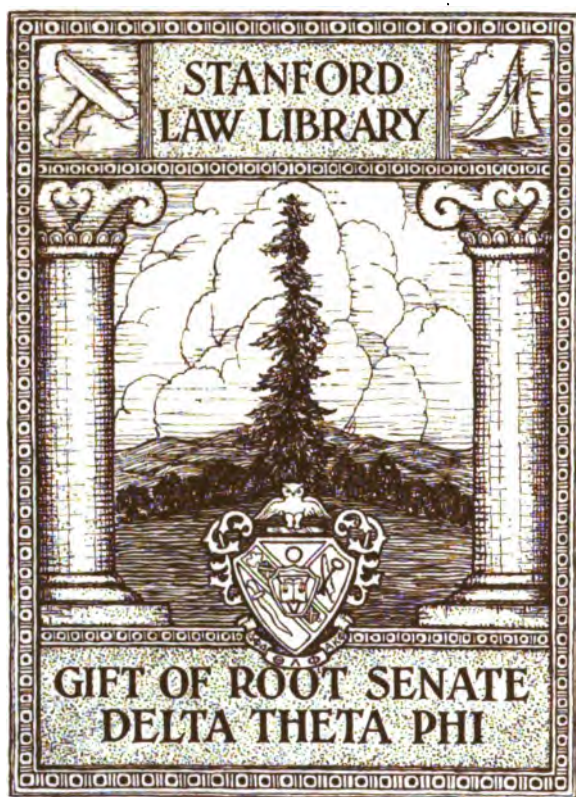
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EDITH PAXLEY

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A
S Y S T E M
OF THE LAW OF
MARINE INSURANCES.

WITH THREE CHAPTERS,
ON BOTTOMRY,
ON INSURANCES ON LIVES, 4155
ON INSURANCES AGAINST FIRE.

By JAMES ALLAN PARK, Esq.
ONE OF HIS MAJESTY'S COUNSEL.

Lex (de qua agimus) est fons equitatis. CICERO.

THE SIXTH EDITION,
WITH CONSIDERABLE ADDITIONS.

IN TWO VOLUMES.
VOL. I.

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TO THE RIGHT HONOURABLE

EDWARD LORD ELLENBOROUGH,

LORD CHIEF JUSTICE, &c. &c. &c.

MY LORD,

I HAVE taken the liberty to dedicate this Edition of the Law of Marine Insurances to your Lordship ; for to whom could a Work of this nature be with so much propriety addressed :—a Work intended to elucidate a subject, with which you were so peculiarly conversant while at the bar, and which has received such clear and powerful illustration from the decisions of your Lordship, since you have presided in the highest Court of Judicature in the kingdom ?

DEDICATION.

The permission which your Lordship has granted upon the present occasion has afforded me this public opportunity of expressing with how much respect and gratitude I am,

My Lord,

Your Lordship's very faithful

And obliged humble Servant,

J. A. PARK.

LINCOLN'S-INN FIELDS,

June, 1809.

ADVERTISEMENT

TO THIS

SIXTH EDITION.

THE following Work having been out of print for a considerable time, more than seven years having elapsed since the publication of the fifth, I have been much solicited to send forth a new Edition. The numerous avocations, in which I am at present engaged, would have made me shrink from so laborious a task: but respect for a profession, to which I have so many reasons to be attached, and which I so highly esteem; has induced me to overcome every difficulty. The labour of such an undertaking has been greatly enhanced by the new and unprecedented circumstances which have occurred in *Europe* during that period, and which have called for a variety of decisions in our Courts, unknown before in the Law of Insurances. Those decisions I have endeavoured faithfully to incorporate in the following Work, as well as I could, under the several titles to which they respectively and peculiarly belong. But since Lord *Ellenborough* has presided in the Court of King's Bench, his judgments have become of so much importance, and his Lord-

ADVERTISEMENT.

ship and the other learned Judges have discussed the various topics that have occurred before them, with so much accuracy, and with so earnest a desire to bring them within the principles already established, that I have seldom found myself at liberty to abridge, lest I should destroy the luminous mode, in which the argument has by them been placed. The consequence has been, that I found it quite impossible to continue the former paging, even with the assistance of letters added to the numerals, without destroying at once almost all possibility of reference. I have therefore pagged this Edition in the usual manner: and it is of the less consequence because the new matter could not be found in any former Edition: and as this is probably the last time that I shall have to solicit, in my own person, professional or public attention to a Work, which has hitherto met with so great a portion of their esteem, I have been desirous to render this Edition as perfect as possible. —Several cases having been decided since they could be inserted in the places to which they respectively belonged, they have been inserted by way of *Addenda* to the present Edition.

J. A. PARK.

LINCOLN'S-INN FIELDS,

June 1809.

PREFACE

TO

THE FIRST EDITION.

WHEN a man presumes to solicit publick notice for any work of a literary nature, the world have a right to know the motives, that induced him to write, and upon what foundation he builds his claim to their attention. Notwithstanding the number of cases, which have of late years been determined in the *English* courts of justice upon the law of insurance, and the uniformity of principle, which pervades them all; yet the doctrine of insurances is not fully known and understood. This in some measure happens from the decisions upon the subject being scattered in the various books of reports, according to the order of time in which they were determined; and the connexion of which, from the nature of those publications, cannot be preserved. As many persons cannot spare time, and few will take the trouble, to collect the cases into one point of view; and as all cases of insurance must necessarily be attended with a number of facts, it is not to be wondered at, if from a cursory, inattentive, and unconnected perusal of them in a chronological order, a great part of the world should remain unacquainted with the true principles of insurance law. No book that I have met with in the *English* language*, has ever yet attempted to form this branch of jurisprudence into a systematick arrangement, or to reduce the cases to any fixed or settled principles.

* Originally written in 1786.

Convinced of the utility of such a work, I thought I could not employ my time more advantageously to my profession or myself; nor better express that respect which I, in common with every lawyer, feel for the venerable magistrate (a), to whom this work is inscribed, and for the other learned judges, who have assisted in erecting this fabrick, than by extracting all the cases upon this subject from the mass of other learning, with which they lie buried in the reporters; and thereby endeavouring to prove to the world that the doctrine of insurance now forms a system as complete in every respect as any other branch of the *English* law. Could any other incitement have been requisite, the opinion of Mr. Justice *Blackstone* would have had considerable weight. "The learning relating to marine insurances," says that elegant commentator (b), "has of late years been greatly improved by a series of judicial decisions, which have now established the law in such a variety of cases, that (if well and judiciously collected) they would form a very complete title in a code of commercial jurisprudence." Urged by these motives, I was induced to undertake this work, which is now presented to the world.

No subject can be properly understood, unless the materials be methodically arranged; and therefore the first object I had in view was to fix upon certain heads, which would be sufficient to comprehend all the law upon insurances. For this part of the work I alone am accountable, the design being entirely my own. It may however, in some degree abate the severity of censure

(a) The late *William* Earl *Mansfield*, to whom the first and second editions of this work were dedicated.

(b) 2 *Blackst. Com.* 490.

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to recollect, that in the arrangement of the subject I had no example to follow, no guide to direct me; and I was left entirely to the impulse of my own judgment. But to enable the profession to judge of the nature of my plan, I will state the reasons that influenced me in the mode I have adopted.

As the policy is the foundation, upon which the whole contract depends, I have begun with that, and endeavoured to shew its nature and its various kinds; and I have also pointed out the requisites which a policy must contain, their reason and origin, as they are to be collected from decided cases, or the usage of merchants. When we have ascertained the nature of a policy, the next object is to discover by what general rules courts of justice have guided themselves in their construction of this species of contract. It is then necessary to descend to a more particular view of the subject, and to fix with accuracy and precision those accidents, which shall be deemed losses within certain words used in the policy. Thus losses by perils of the sea, by capture, by detention, and by barratry, will be a material ground of consideration. When a loss happens, it must either be a partial, or a total loss; and hence it becomes necessary to ascertain in what instances a loss shall only be deemed partial, in what cases it shall be considered as total; and how the amount of a partial loss is to be settled: hence also arises the doctrine of average, salvage, and abandonment. These points therefore will be the next object of attention.

Having considered the various instances in which the underwriter will be liable upon his policy, either for a part, or for the whole amount, of his subscription; we seem to be naturally led to the consideration of those

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cases in which the underwriter is released from his responsibility. This may happen in several ways: For sometimes the policy is void from the beginning, on account of fraud; of the ship not being seaworthy; or of the voyage insured being prohibited. There are also cases, in which the insurer is discharged, because the insured has failed in the performance of those conditions, which he had undertaken to fulfil; such as the non-compliance with warranties; and deviating from the voyage insured: These and many other points of the same nature occupy several chapters.

When the underwriter has never run any risk, it would be unconscionable that he should retain the premium: Therefore after considering those instances, in which this is the case, it is natural next to ascertain in what cases the underwriter should retain, and in what cases he should return the premium.

It would be in vain to tell a man, that he was entitled to the assistance of the law, and that his case was equitable and right, without pointing out in what *forum*, and by what mode of proceeding he should seek a remedy. I have endeavoured to point out the proper tribunal, to which a person injured is to apply; the mode of proceeding, which he is to adopt; and the nature of the evidence he must adduce to substantiate his claim, with respect to this contract: After the discussion of marine insurances, I have added three chapters upon subjects, which, though they do not form a part of the plan, are so materially connected with it in the rules and principles of decision, that it seemed to me the work would be defective without them: These are, bottomry and respondentia; insurances upon lives; and insurances against fire.

When

When I planned this work, I intended to prefix an introduction, containing a short, historical account of the rise and progress of insurances in this country only. But upon the suggestion of one, to whose opinion I bow with deference, and whose judgment will always command obedience; I was induced to enlarge my design. The reader will now find a short account of such of the antient maritime states, as have promulgated any system of naval jurisprudence; and also, of the progress of marine law among the various states of *Europe*. I have endeavoured to trace the origin of insurance to its source; to point out those countries in which it has flourished, and the progress and improvement of it in our own. Such is the arrangement, which I have adopted, and on the propriety of which, the world and the profession are to decide.

As to the mode of treating the subject, it will be proper to observe that, at the head of each chapter, I have stated the principles, upon which the cases on that point depend; and then have quoted the cases themselves to shew, that they are agreeable and consonant to the principles advanced. If there are any cases, which seem to differ from the others, I endeavour to prove, either that they depend upon different principles, or that there are circumstances in them, which make them exceptions to the general rules. In quoting cases, I have been careful minutely to state all the circumstances, and also the opinion of the court without any alteration, or comments of my own; convinced that the utility of a work of this kind consists in the true and accurate account of what the law is, not in idle speculations of a private man, as to what the law ought to be. Besides, one main purpose of such a composition is, to save the professors of the law the trouble of turning over vast

PREFACE TO THE FIRST EDITION.

volumes of reports, by collecting into one book, all the cases upon a particular subject.

But unless the cases are fully and faithfully reported, recourse must still be had to the original reporters, and the end of such a compilation is defeated. At the same time it ought to be observed, that sometimes, though not very often, several different points arise in one cause; and then, in order to preserve the system complete, it is necessary to separate them, and to assign to each its proper place. But still the opinion of the court is given fully on each of the points; and a reference is made from one part of the case to the other.

I had it in contemplation to have had a distinct chapter for the consideration of the law relative to this species of contract in other countries of *Europe*. But upon reflecting that insurances are founded upon the great principles of natural justice, rather than upon any municipal regulations; and that consequently the law must be nearly the same in all countries, I relinquished the idea. Besides, I have throughout the work, which seemed to be a better plan, taken notice in what respects the positive institutions of other maritime states agree or disagree with those of our own: A plan, which serves to illustrate and confirm the *English* system.

It remains to speak of the materials I have used. Conscious that the value of a law book depends upon the purity and excellence of the sources, from which its contents are taken, I have never advanced any position, without referring to the book in which it was found; unless it be upon some unsettled point, where I have stated the arguments that may be adduced on both sides, and left it to the reader to form his own conclusions. In
my

my researches upon this occasion, I have consulted every foreign author that I could possibly obtain; and have made as much use of their labours, as the nature of the plan would admit.

With respect to the decisions of the *English* courts of justice, I believe I have not omitted a single case, that ever has appeared in print upon the subject: Besides which, this collection contains a great number of manuscript cases, of which some have been determined at *Nisi Prius* only, and many have been the subject of deliberation in court upon cases reserved, or upon motions for new trials. For the latter, I myself am chiefly responsible, and upon some future occasion, I shall be happy to correct any errors, which they may contain; as most of them were taken while I was a student, merely for my private use, without any view to future publication. I have, however, by comparing them with such notes as I could obtain, done every thing in my power to render them worthy of the attention of the profession: As to the *Nisi Prius* notes, I am indebted for them to the very liberal and generous communications of my young professional friends; and to some also of those, who are in the first rank at the bar. Indeed, to name any one would be an injustice to the rest; and therefore, I must beg they will accept my general acknowledgments. I should, however, be undeserving of that attention and assistance with which I have been honoured, were I to omit this opportunity of returning my sincere and grateful thanks to Mr. *Justice Buller*, whose abilities are only equalled by his easiness of access, his ready and liberal communication of that knowledge, which is the natural result of such talents, and such unwearied application to study. The many valuable hints I have received from that learned judge, will no doubt contribute much to the utility of this work.

To

To those who are much engaged in the labours of the profession, a full and complete table of the principal matters is of the utmost consequence. I have used my endeavours to render this part of the work as useful as possible, by stating each point under all the heads, that will naturally be resorted to for the solution of any doubt.

Having thus explained the nature of my arrangement, the mode which I have adopted in the discussion of each chapter, and the sources from which my information is derived, I present this volume to the public. The utility and necessity of such a work are universally acknowledged; the attempt is therefore deserving of some praise, and for the defects in the execution I throw myself upon the candour of my profession. The subject was noble, and required greater talents than mine to treat it as it deserved; but if I shall have at all done justice to the great abilities of those distinguished characters, whose names appear in every page, I shall in some measure have attained the object of my wishes, and shall have the pleasure of reflecting, that the time I spent in the composition of this work, has been at least productive of much personal satisfaction and improvement.

December, 1786,

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WHEN we consider the wonderful effects which commerce has produced on the manners of men, when we observe that it tends to wear off those prejudices which give birth to dissensions and animosities, that it unites mankind by the strongest of all ties, the desire of supplying mutual wants; and that it disposes them to peace and concord, by establishing in every community an order of men, whose interest it is to preserve public tranquillity; we are led to think that the history and progress of it would not only be amusing, but highly important and instructive to the inhabitants of every civilized society. Such a work, would be in fact the history of the intercourse and communication of mankind, and must necessarily abound in events the most interesting to every social being, but particularly so to the people of this country, whose great importance in the eyes of *Europe* originated in commerce, and will endure no longer than whilst the same attention continues to be paid to her commercial interests. In a dissertation upon commerce, Insurances form a very distinguished part, and therefore it cannot but be agreeable to the scholar as well as to the lawyer, to trace this branch of commercial law to its source, and to give some account of those various nations, which have been rendered famous by the extent of their commerce, and by the excellency of their maritime regulations. Indeed, in tracing the origin of Insurances, an account of the maritime states that have existed in the world, necessarily forms a part of the enquiry,

a Blackst.
Comm.
458.

Smith's
Wealth of
Nations,
p. 148, oct.
ed.

x Magens, 2.

Insurance then is a contract by which the insurer undertakes, in consideration of a premium equivalent to the hazard run, to indemnify the person insured against certain perils or losses, or against some particular event. When insurance in general is spoken of by professional men, it is understood to signify marine insurances. It is in this light we are at present to consider it; and from the preceding definition it appears to be a contract of indemnity against those perils, to which ships or goods are exposed in the course of their voyage from one place to another. The utility of this species of contract in a commercial country is obvious, and has been taken notice of by very distinguished writers upon commercial affairs. Insurances give great security to the fortunes of private people, and by dividing amongst many that loss, which would ruin an individual, make it fall light and easy upon the whole society. This security tends greatly to the advancement of trade and navigation, because the risk of transporting and exporting being diminished, men will more easily be induced to engage in an extensive trade, to assist in important undertakings, and to join in hazardous enterprises; since a failure in the object will not be attended with those dreadful consequences to them and their families, which must be the case in a country where insurances are unknown. But it is not individuals only that derive advantages from the increase of commerce, the general welfare of the public is also promoted. It is an observation justified by experience, that as soon as the commercial spirit begins to acquire vigour, and to gain the ascendant in any society, we immediately discover a new genius in its policy, its alliances, its wars and negotiations. No nation that cultivated foreign commerce, ever failed to make a distinguished figure on the theatre of the world, as the history of the ancients sufficiently proves; and in proportion as commerce

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merce made its way into the various states of *Europe*, they turned their attention to those objects, and assumed those manners, which distinguish polished nations, and which lead to political consequence and eminence amongst the neighbouring powers (a).

The origin of insurance, like that of many other customs, which depend rather upon traditional than written evidence, and for the honour of inventing and introducing which rival nations contend, has occasioned much doubt among the writers upon mercantile law. Indeed it is involved in so much obscurity that, after all the researches which have been made on the present occasion, any very satisfactory solution of this doubt cannot be promised. One truth however is clear, that, wherever foreign commerce was introduced, insurance must have soon followed as a necessary attendant, it being impossible to carry on any very extensive trade without it, especially in time of war. Some of these writers have ascribed the origin of this contract to *Claudius Casar* the fifth *Roman* emperor, on account of a passage to be found in *Sustinius*. Other respectable authorities have given the honour of it to the *Rhodians*, thus laying a foundation for the idea entertained by many, that the law of insurance had obtained a place in most of the ancient codes of jurisprudence. As the consideration of this question will be attended with pleasure, it will tend much to the complete investigation of it, to consider the state of commerce amongst the most distinguished of the ancient nations, from whence it will appear, that insurances were in those days wholly unknown; or, if they were known, that the smallest proofs of the existence of such a custom have not come down to the present times.

Molloy,
Malyne.

2 Atkyns,
554.

(a) Vide Robertson's *View of the Progress of Society in Europe*.

Schemberg's
Observ. on
Rhodian
laws.

See Ander-
son's Hist.
of Com-
merce.

The *Rhodians* claim the first place in this enquiry : for although there is undoubted testimony, that nations of much greater antiquity than the people of *Rhodes* (a), cultivated commerce, and carried it on to a considerable extent, yet there does not appear to be the smallest ground for entertaining an opinion that any of these naval powers had established amongst themselves, much less communicated to mankind in general, any code or system of marine law. *Rhodes* obtained the sovereignty of the sea, about 916 years before the *Christian Era*, which was almost two hundred years before the building of *Rome*. The situation and fertility of this island were peculiarly favourable for the purposes of navigation, for it lies in the *Mediterranean sea*, a few leagues from the continent of *Lesser Asia*; and its wealth and fertility have always been celebrated by the poets and historians of antiquity. From these circumstances, joined to the activity and industry of the people, it long maintained that superiority which it had acquired; its inhabitants were rich, its alliance was courted, though, from principles of policy, it generally observed a strict neutrality. Notwithstanding this pacific disposition, which commerce naturally inspires, the *Rhodians* at last became an object of jealousy, and were most furiously attacked and besieged by various foreign powers. But in all their wars they discovered their great strength and superiority by sea, and conducted their enterprises with so much activity and skill, as to attract the admiration of their enemies, and the applause of those historians who have given an account of the wars in which they were engaged. In the *Punick*

(a) Eusebius, in his account of the maritime states, mentions three anterior to the *Rhodians*; namely, the *Cretans*, the *Lydians*, and the *Thracians*; the first of whom flourished about five hundred years before the *Rhodians*, the next two hundred, and the last, about eighty years. Euseb. *Chronicon*. lib. 2.

wars,

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wars, the *Romans* found the benefit of their alliance, by the very essential service which they performed, in attacking the naval armaments of the *Carthaginians*.

Polybius,
lib. 10.
Schomb.
Obi.

Wealth naturally produces luxury, which gradually enervates the powers of a state. This was the case with the *Rhodians*; for after maintaining their political importance from the time already mentioned till the termination almost of the *Roman* republic, they visibly began to decline in wealth and power. *Cicero*, in his speech on the *Manilian* law, observes, that they were a people, whose naval power and discipline remained even to the time of his memory; and *Cicero* expired with the republic.

*Cicero pro
lege Mani-
lia*, c. p. 23.

From this short history it appears, that the *Rhodians* were very famous for their naval power and strength: but however respectable they might be on that account, they were much more illustrious, and obtained a much higher praise among the nations of antiquity, for being the first legislators of the sea, and for promulgating a system of marine jurisprudence, to which even the *Romans* themselves paid the greatest deference and respect, and which they adopted as the guide of their conduct in naval affairs. These excellent laws not only served as a rule of conduct to the ancient maritime states; but, as will appear from an attentive comparison of them, have been the basis of all modern regulations respecting navigation and commerce. The time at which these laws were compiled is not precisely ascertained: but we may reasonably suppose, it was about the period when the *Rhodians* first obtained the sovereignty of the sea, which was about 916 years before the æra of Christianity. *Selden* says, that the *Rhodians* maintained the sovereignty of the seas 23 years; and that their laws were compiled in the days

*Selden's
Mare claus-
sum*, lib. 10.
cap. 10.
c. 5.

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of *Jehosaphat*, king of *Judah*. This opinion agrees exactly with the preceding calculation; for this king began his reign about 914 years before the birth of *Christ*. Notwithstanding this, it will always remain a doubtful point, when they were compiled; nor perhaps is it very material that it should be accurately ascertained. It is of more consequence to know when they were adopted by the *Romans*; but that is also a fact involved in some obscurity. We meet with no traces of them in the time of the republic; and from the manner in which *Cicero* mentions them in the speech last alluded to, he treats of them as laws, which had gained the admiration of the world, rather than of such as then made a part of the *Roman* code. *Selden* says, that they obtained a place in the *Roman* law in the reign of *Tiberius Claudius*, a conjecture in which he is supported by *Peckius*, one of the commentators on the laws of *Rhodes*, and by the well known character of *Tiberius* himself, who discovered the greatest attention to maritime affairs, and gave many signal instances of his attachment to *Rhodes*. But although these islanders were thus famous for their laws, we cannot discover from the fragments that have come down to our times, that they had the smallest idea of the contract of insurance; nor is there any tradition to induce us to conjecture, that they ever were acquainted with that mode of securing their property. It is true, that this is not a conclusive argument; because, although no such contract is mentioned in the fragments which we have, it by no means follows that it did not form a part of their whole system, more especially as *Emerigon*, a very celebrated *French* writer, is of opinion, that the real laws of the *Rhodians* have never reached us; and that the fragments which we see, are certainly apocryphal. But as these laws were adopted by the *Romans*, it is fair to conjecture, that whether we have the real regulations of

Schomberg,
Obl. on
Rhodian
Laws.

Mare clau-
sum, lib. 1.
cap. 10. §. 5.

Sueton. Vi-
ta Tiberii
Claudii.

Emerigon,
traité des
Assurances,
Préface,
p. 3.

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of *Rhodes* or not, we should have the contract of insurance, if it had been known to them, incorporated with the other naval laws in the Imperial code. This idea is countenanced by the contract of bottomry, which is to be found in the fragments of the laws of *Rhodes*, and with which the people of that island were certainly acquainted; and in every book of the civil law, the contract *de nautico fœnore, de usurâ maritimâ*, also forms a considerable part. It is not going too far then to presume, that, as the *Romans* adopted a contract so beneficial to commerce, as that of bottomry, they would not have passed over a contract, of which the influence is still more extensively useful in the promotion of navigation and trade, if those, from whom they borrowed their naval laws, had themselves been acquainted either with its nature or advantages.

Leg. Rhod.
l. 1. art. 21.
l. 2. art. 1.
Digest, lib.
22 tit. 2.
Cod. lib. 4.
tit. 33.

Having said thus much of *Rhodes* and its laws, let us turn our attention shortly to the commerce of the *Greeks*. It is certainly true, that commerce flourished very much in several of the states of *Greece*, particularly in *Corinth* and *Athens*. The former separated two seas, was the key of *Greece*, and a city of the utmost importance; its trade was extensive, having a port to receive the merchandizes of *Asia*, and another, those of *Italy*; and that there have been but few cities where the works of art were carried to so high a degree of perfection. *Athens* indeed was particularly famous for commercial knowledge; for their manufactures of all sorts were in high repute, and emulation was excited by the public rewards and honours which were bestowed upon those who attained to excellence in any of the useful arts. The attention of this people to maritime affairs, (for they aimed at the sovereignty of the sea and obtained it,) contributed much to their skill in navigation. The many laws which they left to posterity,

Montesq.
Esprit des
Loix, iv. 21.
ch. 7.

Taylor
Civil Law,
p. 507.

Potter's
Grecian
Antiq.
vol. i.
p. 80. 83,
84. 167.

with regard to imports and exports, and the contract of bargain and sale; the many privileges granted to the mercantile part of the state; the appointment of magistrates, who had the cognizance of controversies that happened between merchants and mariners; the attention which they paid to their market, and the many officers concerned in that department, give us a very favourable idea of their judgment in the true principles of commerce. But notwithstanding this, the *Athenians*, being of a very ambitious disposition, being more attentive to extend their maritime power than to enjoy it, and having a government of such a cast, that the public revenues were distributed among the common people to be squandered at their pleasure (*a*), did not carry on so extensive a trade as might naturally be expected from the number of their seamen, from the produce of their mines, from their influence over the cities of *Greece*, and from those excellent laws and institutions, which have been just enumerated. Their trade was almost entirely confined to *Greece* and to the *Euxine* sea. From such of their laws as we have seen, and from such accounts as we have obtained of their naval history, we have not the smallest reason to suppose, that celebrated people knew any thing of the contract of insurance.

Montesq.
Esprit des
Loix, liv. 21.
c. 7.

(*a*) From several of the orations of Demosthenes it appears, that the poor were entitled to receive from the public stock, as much money as would admit them to the diversions of the theatre; and besides this, it was made a capital offence for any one to propose the restoration of the theatrical money to its original uses. This custom was at length so much abused, that, under pretence of theatrical money, almost all the public funds were distributed among the people. Hence the Athenians contracted an aversion for war, and spent their time and money upon public shews. Of this enormity Demosthenes vehemently complains, and inveighs against it with as much warmth as, from the nature of the law just mentioned, he durst venture to do. See the first and also the third Olynthian.

Some

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Some notice should have been taken before now of the *Phœnicians*, an ancient commercial and opulent people. Indeed, the height of grandeur to which they attained is a sufficient proof of the vast resources of a commercial nation. Many writers, both sacred and profane, from their florid and magnificent descriptions, give a vast idea of their wealth and power. I forbore to speak of them till I should have occasion to mention one of their colonies, that of *Carthage*, which, in opulence and the extent of her commerce and naval power, equalled, if not surpassed, the parent state herself. Whether either, or both, of these maritime powers ever promulgated any code of naval law cannot now be ascertained: for the former was entirely destroyed by *Alexander the Great*; and that it might never be restored, he removed its marine and commerce to *Alexandria*, in which removal, probably all its naval regulations might be lost. *Carthage*, on the other hand, having long disputed with *Rome* the empire of the world, was at last obliged to yield to her victorious rival, who, even after she gained the victory, retained such an hatred to the *Carthaginians*, that she rooted out every vestige of their former greatness. No time, however, nor the hatred of the *Romans*, can wholly obliterate the amazing accounts which have come down to us, of the enterprising spirit, and hazardous voyages of the *Carthaginians*, almost exceeding the bounds of credibility. Thus much is certain, that they took such distant voyages, and went so far even without the *Mediterranean*, both to the *South* and *North* of it, as induced many people to suppose, that they were acquainted with the use of the compass. It is evident, however, that they only followed the coasts. Besides, the ancients might sometimes have performed such voyages, as would make one imagine they had the use of the compass: for if a pilot were far from land, and during his voyage

Barrow, Lex
Merc. red.
4th edit.
Introd. p. 3.

Quint. Cur-
tius, lib. 4-
cap. 8, &c.

Anderson's
Hist. of
Commerce,
Introd. p. 31,
32, f. l. ed.

Montesq.
liv. 21.
ch. 8.

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voyage had such serene weather that in the night he could always see the polar star, and in the day, the rising and the setting sun, he might regulate his course by them, nearly as we do now by the compass. This however must be a fortuitous case, and not a regular plan of navigation (a).

From a slight attention to the commercial and maritime history of the *Romans*, it will appear that they were as great strangers to the contract of insurance, as any of those people, of whom much has been already said. It seems to be universally agreed that the *Romans* were never very conspicuous as a maritime power, considered either in a commercial or warlike point of view. In the latter case they relied chiefly on their land forces, who were disciplined to stand always firm and undaunted; and till towards the latter age of the republic, when we read of some wonderful naval exertions, they do not seem to have possessed any thing of a marine establishment. They never were distinguished by a jealousy for trade, and even when they attacked *Carthage*, they did it as a rival for empire, and not for commerce. It is recorded by historians, that till the first *Punic* war, upwards of 400 years after the build-

Monte's
liv. 21.
ch. 9.

Ferguson's
Rom. Rep.
vol. i.
p. 100.

(a) What I have said in the text has been supposed by some not to do sufficient justice to the commercial and enterprising spirit of the Phœnicians, who are said to have visited Britain about 900 years before Christ *. I have already admitted the almost incredible voyages which they performed; but as it is also undoubtedly true, that they were unacquainted with the mariner's compass, the honour of discovering which was reserved for later times, they must, in most cases, have followed the coasts. Nor does their visiting Britain militate against this idea; for by attending to the situation of the two places, the voyage might have been performed, though no doubt very tediously, without once losing sight of land.

* See Borlase's Hist. of Cornwall, p. 27; and Henry's Hist. of Great Britain book 1. chap. 6.

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ing of the city, the *Romans* were so entirely ignorant of ship building, that they took for a model a *Carthaginian* galley, which had been accidentally stranded at *Messina*. *Carthage*, it must be observed, was at that time in her zenith of power and greatness; and yet from the model of one of her galleys, the *Romans* were able in sixty days from the time the timber was cut down, to fit out and man for sea, one hundred galleys, of five tiers, and twenty of three tiers of oars. Such were the ships of the famous *Carthage*. The spirit of the people of *Rome* was entirely averse from commerce; and fully justifies what was said by a celebrated *Roman* historian, "*sepe quisque hostem ferire, murum adscendere, conspici, dum tale facinus faceret, properabat; eas divitias, eam bonam famam, magnamque nobilitatem putabant.*" These exploits were the only glory of a *Roman*, no employment was deemed honourable but the plough and the sword, and every species of gain was deemed disgraceful to those of *Patrician* rank. But it was from the constitution of the government, that individuals were possessed of this warlike spirit, so contrary to that which leads to eminence in commercial pursuits. The cast of their civil government was of a military nature; and for a considerable time, the civil and military officer was the same person; he distributed justice in *Rome*, and commanded their legions in the field, till the vast increase of their empire, and the multiplicity of civil business, occasioned a separation. The natural consequence of this was, that no man who was not of the profession of his country, was much esteemed at *Rome*; and accordingly we find that traders and mechanics were incapable of succeeding to any public honours. Nay, so far was commerce from being encouraged at *Rome*, that it was deemed prejudicial to the state. The *Romans*, by humanity, terror, triumphs, tributes, and taxes, which they imposed on the con-

quered

Sallust. Ca-
tilina, c. 7.

Livy, lib.
21. cap. 63.

Taylor's
Civil Law,
p. 502.

Taylor,
498.

Civil Law,
501.

quered countries, increased the riches of their city. Laws were passed to prevent the exportation of their gold; the reason of which seems to be, that it carried away their money and brought them nothing in return but luxury, the bane of virtue, and destruction of empire. Could it be expected, says Dr. *Taylor*, that a people of soldiers, whose trade was their sword, and whose sword supplied all the advantages of trade; who brought the treasures of the world into their exchequer, without exporting any thing but their own personal bravery; who raised the public revenues, not by the culture of *Italy*, but by the tributes of provinces; who had *Rome* for their mansion, and the world for their farm; should have leisure to set forward the articles of commerce, or be likely to pay any regard to the character of its professors? The terms of defiance, upon which they lived with all mankind, in consequence of this martial spirit, would have prevented all the good effects of commerce, had their disposition allowed them to pursue it. That restless spirit, which kept their armies on foot, and their swords in their hands, for a succession of centuries, was fatal to factories and correspondence. The world was in arms, and insurances and under-writing were but a dead letter, This is very nearly a true representation of the case, for it is certain that not one law was made in favour of commerce, in the time of the commonwealth; on the contrary, it was greatly discouraged-as introductory of luxury, which was supposed not to be compatible with the severity of their manners. It is also no less true than singular, that a people who were so well acquainted with the true principles of natural reason and justice, who applied those principles with so much propriety to the various wants and necessities of human society, and who had the honour of establishing a system of law, which has been adopted as the rule of action by the
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greatest

greatest part of *Europe*, and which continues to be so even at the present day, never attempted to introduce any plan of maritime jurisprudence. Nay, this idea is carried farther by some writers, who declare, and I believe with truth, at least we can discover nothing to the contrary, that the *Romans* did not even take the pains to digest the materials which they had borrowed; and that whilst they carried every other branch of law to the highest pitch of accuracy and refinement, they were content to stand indebted to one of their own provinces both for the form and matter of their maritime code.

Schomberg's Observations on the Rhodian Laws.

The *Romans*, it is true, after the first *Punick* war, constantly maintained a fleet; but long after that time, even in the year of the city 563, it was observed of them, that they were very unskilful in the art of navigation. One of their own historians, who flourished at the time of the second *Punick* war, and who was tutor to the great *Scipio*, justly remarks, that at no period did they ever make any figure at sea as a commercial power. Even when they arrived at their highest perfection in naval skill, their fleets were never employed for the purposes of trade, in the discovery of new states, or establishing commercial intercourse with those they already knew. The greatest extent of their commerce was to bring to the market of *Rome* that corn, which they collected in the various granaries of *Sicily*, *Africa*, and *Egypt*. Upon all other occasions the business of their fleet was to overawe the conquered, and to transport to *Rome* the spoils of ruined provinces. In such a state of commerce, it is impossible that insurances could exist; and we have already quoted the opinion of a respectable author to shew that they were unknown.

Polybius.

Dr. Taylor, ut supra.

There

There are several reasons applicable to all the ancient maritime powers, which seem to prove to demonstration, that insurances were not in use. We have seen, that insurances are only introduced where commerce is widely extended. The commerce of the ancients, compared with modern times, could not be very considerable, as it was chiefly confined within the *Mediterranean, Egean, and Euxine* seas; to which they were compelled more from necessity than inclination. *Carthage* in all her glory had not arrived at any great degree of perfection in the art of ship building. Vessels of the best construction at that time could only be navigated with oars, or when they had a fair wind on a smooth sea: they might be built of green timber; and in case of a storm, could run ashore under any cover, or upon any beach that was free from rocks: in short, they were merely galleys, and were managed with the greater difficulty on account of the position of the sails, and the mode of rigging practised in those days. This could not fail of proving a considerable obstacle to the extension of commerce. But when we consider, in addition to the bad construction of their ships, that the ancients were utterly ignorant of that unerring guide, the mariner's compass, (the honour of inventing which was reserved for more modern times,) by reason of which they durst not venture out of sight of land, for fear of being overtaken by tempests, and being left at large in the boundless ocean, their commerce could not have been great; although we are even led to admire the progress which they made in commercial affairs. It is true, that many distant naval expeditions were made under all these disadvantages, which often proved fatal to the adventurers (*a*). These expeditions, how-

Anderson's
Hist. of
Commerce.

Montesq.
Esprit des
Loix, liv. 21.
ch. 6.

(*a*) Huet, bishop of Avranches, in his very instructive and entertaining treatise on the commerce and navigation of the ancients has with infinite labour and accuracy collected the most remarkable facts on this head. Ch. 8.

ever,

ever, could add little or nothing to their maritime or geographical skill, in which the ancients were certainly very deficient, on account of the necessity they were always under of coasting the shores, for want of a better guide; and indeed, the shores were the only compass. These observations are not intended to detract from that merit, which has been already allowed to the ancients for their naval exertions; because they are founded merely on a comparison of their powers and knowledge in those arts with improvements of the moderns, and are adduced to shew that, under such disadvantages and obstacles to the extension of their trade and commerce, it was impossible that insurances could be at all known to the ancient world.

Montesq.
vol. ii.
ch. 6.

M. *Emerigon* agrees, that the contract of insurance, as it is understood at this day, was not in use amongst the *Romans*; but he thinks he discovers some traces of it in the history of that people. The first instance given by this learned writer is this, that about the time of the second *Punic* war, those who had undertaken to supply the troops in *Spain* with provisions and military stores, made it a previous condition that the republic should be at the hazard of exporting them, according to the words of *Livy*, "*Ut quæ in naves imposuissent, ab hostium, tempestatisve vi, publico periculo essent.*" But with all deference to so great a name, this seems to bear no resemblance to the contract of insurance; for it is nothing more than every well regulated state is bound to do by the ties of natural justice. It is equitable and right, that those, who in times of public danger appropriate their private wealth to the advancement of the public service, should be reimbursed from the purse of the state for the private losses they may sustain. This indeed is the rule of conduct between man and man: for when one man purchases goods of another to

Preface to
his work,
p. 4.

Livy, lib.
23. cap. 49.

be sent abroad, was it ever supposed that the seller was to run the risk of the voyage: or that if the goods perished, he was never to be paid? If such a doctrine were to prevail in any country, the state could only be supplied with necessaries in time of war, by means of extortion, rapine, and violence.

Traité des
Assur. loc.
cit. Livy,
lib. 25.
cap. 3.

Another instance given by *Emerigon* is a story, which we find recorded by *Livy*, of some men who were charged with the care of exporting provisions for the army, and who, *quia publicum periculum erat a vi tempestatis in iis, quæ portarentur ad exercitus*, endeavoured by fraud to destroy the ship, and then told the directors of the state, that many very valuable articles were on board; whereas they had taken care to send out very old, rotten ships, in which were a few commodities, and those of small value. That part of this story which is material to the present enquiry, has already met with an answer in what was said upon the last quotation: and the propriety of a government's indemnifying those who might suffer in the public service, is not at all altered by the misconduct of some individuals (*a*).

Epistolæ ad
Familiares,
lib. 2. epist.
17.

The next instance is from one of *Cicero's* epistles, and is of a different nature from those last mentioned; because here *Cicero* seems to wish that the property in question should be secured, not only for himself, but also for the people of *Rome*. *Cicero*, having gained a victory in *Cilicia*, and the civil war between *Cæsar* and *Pompey* being then a matter almost unavoidable, wrote

Millar on
Insurances.

(*a*) It has been truly observed by Mr. Millar, that in these instances from the Roman historians, no mention is made of a premium paid by the merchant for the hazard undertaken; and that they are rather to be considered as examples of a bounty offered by the publick, than of a mutual contract.

to *Caninius Sallustius* at *Laodicea*, in which letter he uses these words: "*Laodiceæ me prædes accepturum arbitror omnis pecuniæ publicæ, ut et mihi et populo cautum sit sine vecturæ periculo.*" From this passage it is inferred that *Cicero* alludes to an insurance. I own, from the meaning of the word *prædes*, and from the situation of affairs at *Rome*, it seems as if *Cicero* wished rather to find some secure and substantial person at *Laodicea*, in whose care and custody he might leave this money till more peaceable times; and it is very unlikely that in such a troublesome conjuncture he should be desirous of bringing a great treasure to the scene of faction and confusion, especially as, in a letter to his friend *Atticus*, he declares himself at a great loss to know what line of conduct he ought to pursue. But even if he wished to bring it to *Rome*, the mode he proposed seems more like the modern bill of exchange, than a policy of insurance (*a*). Besides, unless this species of contract was at that time tolerably well understood, *Sallust*, the person to whom he wrote, would have found considerable difficulty in comprehending his meaning from the single sentence in his letter which has been mentioned; and if it were well known, is it possible to suppose it would not have obtained a place in their code of laws?

Ferguson's
Hist. of
the Rom.
Rep. book
4. ch. 5.

Cicero ad
Atticum,
lib. 7.
epist. 1.

But the passage upon which those, who contend for the antiquity of this branch of commerce, have chiefly

Molloy,
Malynes.

(*a*) Since I published the first edition of this work I have looked into Melmoth's translation of *Cicero's* epistles; and I am happy to find that, without knowing I had such an authority, I have put the same sense upon this passage which that elegant translator had done before me. The whole sentence is translated thus: "I purpose to leave the money at *Laodicea*, which shall arise from the sale of those spoils, and to take security for its being paid in *Rome*: in order to avoid the hazard both to myself and the commonwealth of conveying it in specie."

relied, is one to be found in *Suetonius*, in the eighteenth chapter of his life of *Tiberius Claudius*, the fifth emperor of *Rome*. "*Negotiatoribus certa lucra proposuit, suscepto in se damno, si cui quid per tempestates accideret.*" This sentence wholly unconnected seems to convey such an idea; but we must attend to the context in order to understand it. This relates merely to the corn trade; for as the *Roman* territory was not sufficient to supply enough for the consumption of the city, it became absolutely necessary to give great encouragement to this branch of commerce: nay it was a political, not a mercantile concern, for the very existence of the empire depended upon it. It was this circumstance which induced the emperor to pay such regard to this branch of trade, to propose bounties, and to confer certain privileges, the *certa lucra*, of which *Suetonius* speaks, upon those who would venture out to sea for the public service in the midst of winter. Dr. *Taylor* tells us, that a private consideration also had some weight with *Claudius* upon this occasion; for that once, in a great scarcity of provisions, he was attacked in the forum by the populace, and so disagreeably treated with abuse, and crusts of stale bread, that he with great difficulty escaped through some private passage; from which time he made it his great care and concern to get corn imported, even in the winter. As to the risk which *Suetonius* says the emperor took upon himself, it is to be observed, that although the ships were private property, yet they would not have gone to sea in the dangerous season they did, had it not been for the public service, and to provide provisions for the use of the whole city. This being the case, we have already shewn, that it would be contrary to the first principles of justice and equity, and to the practice followed at this day by all governments which are founded on just principles, to allow such losses to fall

fall upon individuals (a). From what has been said it appears evident, that the *Romans* had no knowledge of insurances; in addition to which both *Grotius* and *Bynkershoek* have expressly declared, that among the ancients this contract was unknown; the latter of whom uses these expressions: "*Adeo tamen ille contractus olim fuit incognitus, ut nec nomen ejus, nec rem ipsam in jure Romano deprehendas* (b)."

Grotius de Jure Belli, lib. 2. cap. 12. c. 3.
Bynkershoek quest. Juris Publici, lib. 1. cap. 21.

But to whatever degree of excellence the *Romans* attained either in literature, commerce, or any of the refined arts, they all visibly declined when the *Roman* empire was overrun by the barbarians; or, perhaps it may be said with greater propriety, that they were overwhelmed and lost with that power which had raised them to be the object of public attention and notice. For in times of public ruin and desolation,

(a) The observations here made seem, upon examination, to be agreeable to the ideas of *Dr. Taylor*, the president *Montesquieu*, and *Mr. Schomberg*, upon the same subject. See also the opinion of a learned civilian, *Langenbeck* of *Hamburgh*, in *Magen's Essay* on insurances. Vol. i. p. 1.

(b) By a late work of *M. De Pauw*, intitled *Recherches Philosophiques sur les Grecs*, it is manifest that the *Athenians* were well acquainted with the nature of bills of exchange; and this learned foreigner seems to think it a matter of uncertainty whether the insurance of ships was ever practised among them: but he says it is clear that barratry was not unknown to them. I am inclined, however, to think with *Grotius* and *Bynkershoek*, that this contract was as much unknown to that great people as to the rest of the ancient world. If this had not been the case, can it be supposed that we should find no trace of it in their history, the speeches of their orators or their laws? Is it not as likely to have been mentioned, as bills of exchange; and particularly when barratry was mentioned, if this contract had had an existence, would it not have been stated, on whom the loss was to fall? Besides, the instance given of barratry by *M. De Pauw* is not what we call barratry in *England*; for the case put is a case of fraud committed by the owners, who, by the law of *England*, cannot commit barratry, which is a criminal act of the captain, to the prejudice of his owners, and without their privity or consent.

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when war rears its standard, lays waste cities, and tramples on the noblest improvements, it is impossible for commerce to hold its station, or to flourish in the midst of contention and tumult.

Hume.

It is the observation of a profound modern historian, that there is an ultimate point of depression, as well as of exaltation, from which human affairs naturally return in a contrary progress, and beyond which they seldom pass in their advancement or decline. This was the case with respect to commerce. When the repeated incursions of the Barbarians had ravaged the *Roman* empire, and had checked every liberal improvement, some people forced by necessity, or led by inclination, took shelter in a few marshy islands that lay near the coast of *Italy*, and which would never have been thought worth inhabiting in time of peace. This happened in the sixth century; and at the first settling of these wanderers, they had certainly no other object in view, than that of living in a tolerable degree of security from their enemies, and of procuring a moderate subsistence. As these islands were divided from each other by narrow channels, and those channels were so encumbered by shallows, that it was impossible for strangers to navigate them, they found that security which they wished; and by uniting among themselves for the sake of improving their condition, they became in the eighth century a well established republic. This, though it may appear strange, was the origin of the famous republic of *Venice*, which soon became a great commercial power; for, from the first moment that those people took possession of the islands, necessity made them extremely attentive to commerce; the first beginning of which was naturally fishing. Next to fishing, they began to trade in salt, many pits of which were discovered in their own islands; and at last their city gradually

Anderson's
History of
Commerce,
vol. vi. l.
p. 39, 20.

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gradually became the magazine for the merchandize of the neighbouring continent on all sides, and they themselves the general carriers of *Europe*. Thus to the people of *Italy*, and to those of *Venice* and *Genoa* in particular, we are to attribute the re-establishment of commerce. Of the causes which contributed to its revival, it remains to speak.

Various causes concurred to revive the spirit of commerce and to renew, in some degree, that intercourse between nations, which during the period of *Gothic* ignorance and barbarity, had been much interrupted. The religious wars of the eleventh century, called the *Crusades*, by leading many from every part of *Europe* into *Asia*, opened an extensive communication between the East and West; and though the avowed purpose of these expeditions was conquest, and not commerce; though the issue of them proved as unfortunate, as the motives for undertaking them were wild and enthusiastic, yet their commercial effects were beneficial and lasting. For the first armies, which ranged themselves under the banner of the Cross, having been led through a vast extent of country, and having suffered so much from the length of their march, and the barbarism and inhospitality of the people inhabiting those countries through which they travelled, others were deterred from taking the same course, and chose rather to go by sea, than encounter so many hardships. *Venice*, *Genoa*, and *Pisa*, furnished the transports to convey the troops: and it is reported, that the sums were immense which they received merely for freight. Besides this, the Crusaders contracted with them for supplies of military stores and provisions; their fleets hovered on the coast; and by supplying the army with whatever was wanting, they engrossed all the advantages arising from this branch of commerce. These states

Robertson's
View of So-
ciety, &c.

were also benefited by the success which attended the arms of these religious and enthusiastic heroes; for there are charters yet extant, containing grants to the *Venetians*, *Pisans*, and *Genoese*, of great privileges in the various settlements which the Christians had gained in *Asia*. When the Crusaders seized *Constantinople*, the *Venetians*, who had planned the enterprize, transferred to their own state many of the valuable branches of commerce, which had formerly centered in *Constantinople*. Another great cause of the revival of commerce, was the invention of the Mariner's Compass, which, by rendering navigation more secure as well as more adventurous, facilitated the communications between remote nations, and brought them nearer to each other. The honour of this invention, so beneficial to mankind, has been claimed by the *French*; and their claim has been allowed by several authors, and maintained by a celebrated writer of their own. In this opinion perhaps national partiality may have some weight. Most authors, however, agree that the inventor was *Flavio de Gioia*, a native of *Amalfi*, an ancient commercial city in the kingdom of *Naples* (a).

Huet
Traité du
Commerce
des Anciens,
cap. 10.
Anderf.
History of
Commerce,
fol. edit.
vol. i. p.
344.

It is evident, that almost all the commerce of *Europe*, in those days, centered amongst the *Italians*. As they at that time carried on and established a regular trade with the East in the ports of *Egypt*, and drew from thence all the rich produce of *India*; it is reasonable to suppose, that in order to support so extensive a commerce, these industrious and ingenious people

Anderfon's
Introd.
fol. edit.
p. 7.

(a) It appears from *Anderfon*, that some people had supposed that the conquests of *Charlemagne* in *Italy*, towards the end of the 8th century, and his subsequent establishment of Christianity in the Western and Northern parts of *Germany*, contributed greatly to the revival of commerce. In what I have said upon this subject, I chose rather to follow the steps of a very elegant and profound historian of modern times. *Robertson's View of Society*, &c.

were

were the first who introduced insurances into the system of mercantile affairs. It is true, there is no direct authority to warrant a positive assertion, that they were the inventors of this kind of contract: but it is certain, that the knowledge of it came with them into the different maritime states, in which parties of them settled: and when it is admitted that they were the carriers, manufacturers, and bankers of *Europe*, it is probable that they also led the way to the establishment of a contract, which is so essentially necessary to the support and cultivation of commerce. It has, however, been asserted by writers of the *French* nation (*a*), that insurance dates its origin in the year 1182, and that it was introduced by the *Jews*, who were banished from *France* about that period, and who took that method to facilitate and secure the removal of their effects. They proceed to say, that the *Lombards*, who were not idle spectators of this contrivance, adopted it, and in a short time improved it considerably. It is not very necessary to enquire into the truth of this fact, nor indeed are there materials to enable us to do so: but it is observable that the President *Montesquieu* mentions that the *Jews* upon this occasion invented bills of exchange; but does not say a syllable of policies of insurance. It is agreed, however, that if the *Lombards* were not the inventors, they were at least the first who brought the contract of insurance to perfection, and introduced it to the world (*b*).

Monf. Savary Dict. Univ. Le Guillon, c. 1. art. 1.

Esprit des Loix, liv. 21. c. 26.

(*a*) *Anderson* says, the *Jews* were banished from *France* in 1143. *Anderson's History of Commerce*, vol. i, p. 82. But I believe such an event twice took place in that kingdom.

(*b*) I am aware that several learned men are of opinion, that insurances were of an earlier date than is here ascribed to them. On a subject where so much obscurity must necessarily exist, I am by no means tenacious of my opinion; but the inclination of my mind is to adhere to the idea that the *Lombards* were the inventors. See also Mr. *Millar's* Introduction.

Before we come to consider the amazing improvements which have taken place, with respect to this branch of commerce, in our own country, in these days, it will be expected that some notice should be taken of those maritime codes, and naval regulations, which have distinguished the modern, no less than the laws of *Rhodes* did the ancient world.

Vol. i. p.
58.

To the people of *Amalfi* we are indebted as well for the first code of modern sea laws, as for the invention of the compass. We learn from *Anderson*, that the city of *Amalfi*, so long ago as the year 1020, was so famous for its merchants and ships, that its inhabitants at that time obtained from the Caliph of *Egypt* a safe conduct, to enable them to trade freely in all his dominions; and they also received from him several other distinguished privileges. It was towards the close of that century, that they promulgated their system of marine law, which, from the place of its compilation, received the denomination of *Tabula Amalfitana*. This table superseded in a great measure the ancient *Jus Rhodianum*; and its authority was acknowledged by all the states of *Italy*, for some centuries. But as trade increased very rapidly in other cities on the coast of the *Mediterranean* sea, they became unwilling to receive laws from a neighbouring state, which they now equalled, if not surpassed, in the extent of their naval establishments. Every one, therefore, began to erect a tribunal, in order to decide all controverted points, according to laws peculiar to itself; but still referring, in matters of higher moment, to the former rule of action, the *Amalfitan* code. From such a variety of laws, as must necessarily be the consequence of each of the *Italian* states becoming its own legislator, so much disorder and confusion arose, that general convenience at last compelled them to do that, which jealousy of
each

each others power and growing commerce would for ever have prevented them from effecting; and at a general assembly it was agreed to digest the laws of all the separate communities into one body. Every regulation therefore, which was thought to be founded in justice either in the laws of *Marseilles*, *Pisa*, *Genoa*, *Venice*, or *Barcelona*, was collected into one mass, and published in the 14th century, under the title of *Consolato del Mare*. A French writer *Sur la Saisie des Batimens neutres*, speaks of this production in a very unfavourable way; and calls it a rude ill-formed mass of maritime and positive regulations, of ordinances of the middle ages, and of private decisions. Indeed when we consider that this was a compilation from the various regulations of so many different states, it could not excite much surprise, if it really merited the censure of this author. But upon examination it is a work of considerable merit; the decisions it contains are founded on the laws of nations; it has been received and allowed to have the force of law in every part of *Italy*; and it is the source from whence the people of that country, as well as those of *Spain* and *France*, have been said to derive many of their best marine regulations. Unfortunately too, *Emerigon* has discovered, that because one of the chapters in the *Consolato del Mare* overturns some favourite system of this learned author, he is out of humour with the whole composition. One thing, however, is clear, that neither the *Consolato del Mare*, nor the *Amalfitan* code, upon which it is founded, contains any thing upon insurance law, so that we have here another confirmation of the idea, that this contract was not a production of very ancient times (a).

Vinnissie
Peckiam,
190.

Emerigon,
preface,
. 2.

(a) In what I have said upon the *Amalfitan* code, I have found myself extremely indebted to Mr. *Schomberg*'s very ingenious observations upon that subject, in his treatise on the maritime laws of *Rhodes*.

The spirit of commerce was not, however, confined to the South parts of *Europe*; it now began to extend itself among the inhabitants of the Western coasts. But whatever maritime regulations they might have established among themselves, they were found not to be sufficiently extensive for the commercial intercourse which began to take place in those countries in the course of the 12th century. Accordingly, about the year 1194, *Richard* the First, king of *England*, on his return from his wild expedition to the *Holy Land*, having staid to repose himself for some time at the isle of *Oleron*, in the *Bay of Biscay*, an island which he inherited in right of his mother, whose portion it was in marriage with his father *Henry* the Second, gave orders for the compilation of a maritime code. Some authors suppose that the hardships and dangers, to which, in the course of his expedition, he saw adventurers by sea were exposed, induced him to promulgate a law, by which their condition might be rendered more comfortable. Others imagine, and probably their supposition is better founded, that the great intercourse between his *English* and *French* subjects, and their allies, required a certain general system of sea law, for the more speedy and impartial determination of all disputes which might occasionally arise. The laws of *Oleron*, therefore, which are in substance but an abstract of the old *Rhodian* laws, with some additions and alterations, accommodated to the practice of that age, and the customs of the Western nations, were proposed as a common standard and measure for the more equal distribution of justice among the people of different governments. These excellent regulations were so much esteemed, that they have been the model on which all modern sea laws have been founded; and two distinguished nations have contended for the honour of their production. *France*, jealous of the lustre which

Schomberg's Observ. on the Rhodian Laws.

Sir Philip Meadows's Observ. on the Dom. of the Sea, c. 4.

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which the *English* justly derived from the production of this code, with much anxiety claims this honour to herself; and very distinguished authors have stood forth the champions of her claim. The substance of their argument is, that *Eleanor*, wife of *Henry Second*, king of *England*, and Duchess of *Guyenne*, returning from the *Holy Land*, and having seen the beneficial effects of the *Consolato del Mare*, ordered the first draught of the judgments or laws of *Oleron* to be made: *that her son Richard the First*, returning from the same expedition, enlarged and improved what his mother had begun: that they were certainly intended for the use of the *French* merely, because they were written in the old *Gascon French*, without any mixture of the *Norman* or *English* languages: that they constantly refer for examples of voyages to *Bordeaux*, *St. Malo*, and other sea-ports in *France*; never to the *Thames*, or to any port of *England* or *Ireland*: and that they were made by a Duchess and Duke of *Guyenne*, for *Guyenne*, and not for their kingdom of *England*. One of these learned writers adds a reason, which he thinks very conclusive, to prove that these laws were of *French* extraction; namely, that from their first appearance, their decisions have been treated with extreme respect in the courts of *France*.

Cleirac
Coutumes
de la Mer,
p. 2. V. 1. in
Emerigon.

Valin.

In these days, it is very immaterial whether *France* or *England* is entitled to the honour they respectively claim, and I shall not tire the reader with any argument upon the point (a).

Anderfon in his history of commerce has expressly stated, but he does not adduce any authority in support

Vol. i. p.
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(a) For the arguments in favour of the *English* claim, the reader may consult *Selden's Mare Clausum*, lib. 2. cap. 24. Mr. Just. *Blackstone's Commentaries*, vol. i. page 418. *Schomberg's Observations*, page 88.

of

Preface,
P. 18.

of his opinion, that the laws of *Oleron* treat of insurances. I have read them repeatedly with the direct view of discovering whether insurances were of so ancient a date : but I have not found a single word which could induce me to subscribe to such an assertion. In confirmation of my opinion, *Emerigon*, speaking of these laws, has observed, “ *Il n’y est pas dit le mot du contrat d’Assurance, qui apparemment n’étoit pas encore alors en usage.*”

Cleirac Us
et Coutumes
de la Mer.
Emerigon,
Pref.

But while we pay due respect and veneration to those maritime regulations, which distinguished the Southern and Western parts of *Europe*, it would be improper silently to pass over the laws, which were ordained by an industrious and respectable body of people, who inhabited the city of *Wibsey*, famous for its commerce, and renowned on the shores of the *Baltic*. The merchants of this city carried on so extensive a trade, and gave themselves up so entirely to commerce, that they must doubtless have found a great inconvenience in having no maritime code, to which they could refer to decide their disputes. To such a cause we are probably indebted for those laws and marine ordinances, which bear the name of *Wibsey*, which were received by the *Swedes*, at the time they were composed, as a just and equitable rule of action, and which were long respected (and for aught I know, are to this day observed) by the *Germans*, *Swedes*, *Danes*, and by all the Northern nations ; although the city in which they received their origin, has long dwindled into insignificancy and contempt. At what time these laws were compiled is a matter of dispute ; and different writers have adopted different periods, in order to answer their own particular ends, or to advance the honour of that age which it happened to be their business to extol. The writers of the North pretend

pretend that *Wisbuy* was a great commercial city, in the 9th century; from whence they argue, that their laws must be of very high antiquity; that they were the model, from which those of *Oleron* were copied, and that they were received and acknowledged by all nations in *Europe*, even to the Straits of *Gibraltar*. On the other hand it is answered, and with much strength of reasoning, that the Northern code is a transcript from that of *Oleron*, although it contains several additions: for it has been shewn, that the laws of *Oleron* were promulgated by *Richard* the First about the close of the twelfth century, at which time, as appears by the report of a *Swedish* historian, the city of *Wisbuy* was not built, nor for near a century afterwards; that the inhabitants were merely strangers collected together from different parts, who, so far from having any power or influence over their neighbours, were not absolute masters of their own city. Besides, if their laws had been prior to those of *Oleron*, we should have found in the latter some regulations respecting insurances; because a copyist never would have omitted so material a branch of commercial legislation, the laws of *Wisbuy* having expressly mentioned insurances, and provided, that if the merchant obliged the master to insure the ship, the merchant shall be obliged to insure the master's life against the hazards of the sea.

Cleirac, 4.

Ulfus Magnus, lib. 10, cap. 16.

Art. 66.

Afterwards, towards the close of the fifteenth century, we find from history, that many considerable regulations were made at *Barcelona* in *Spain*, respecting marine insurances.

Robertson's Vie, vol. i. p. 351. quarto edit. Emerigon, pref. p. 12.

But if the laws of *Wisbuy* were not prior to those of *Oleron*, yet it is much to their honour, and shews in what estimation they were held in the greatest part of *Europe*,

Schomb.
Observ.
106.

Robertson's
View of So-
ciety.

Kuricks
Comm.
Schomb.
Observ.

Robertson's
View, &c.
Ander. Hist.
of Comm.

Europe, that after having for a long course of time enjoyed the highest authority in all the Northern tribunals for maritime affairs, they were thought worthy of being adopted as the basis of the ordinances of the *Hanseatick* league. Of this ancient and famous confederacy it will be sufficient in this place to observe, that it began about the thirteenth century, and originated with the cities of *Lubeck* and *Hamburg*, which were obliged to enter into a league of mutual defence, in order to protect themselves against the nations round the *Baltick*, who were extremely barbarous, and infested that sea with their piracies. These two cities derived such advantages from their union, that other towns acceded to the confederacy, and in a short time, eighty of the most considerable cities, scattered through those countries, which stretch from the bottom of the *Baltick* to *Cologne* upon the *Rhine*, joined in the famous *Hanseatick League*; which became so formidable, that its alliance was courted, and its enmity dreaded by the most powerful monarchs. This association, it is said, formed the first systematick plan of commerce known in *Europe*: but notwithstanding this, they did not for a long time publish any maritime code, but were entirely governed by those of *Oleron* and *Wisbuy*. At a general meeting, however, held at *Lubeck* in the year 1614, it was agreed to extract from those compilations whatever should be thought most useful, and that it should in future be the rule of decision in every contested point. It was prior to this time, about the fourteenth century, that the members of this league were in their greatest splendour; their commerce was at its height; they supplied the rest of *Europe* with naval stores, and they pitched upon different towns, the most eminent of which was *Bruges* in *Flanders*, where they established staples, in which their commerce was regularly carried on. The
sovereigns

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Sovereigns of *Europe* looked up to the *Hanseatick League* with esteem and admiration, and the kings of *France* and *England* granted them considerable privileges. But when this union had rendered them rich and powerful, they grew arrogant and over-bearing, which induced the princes, whom they had offended, to take a closer and more accurate view of the danger which might arise from such a conspiracy, and of the advantages which might accrue to themselves from the possession of their trade. These causes at last concurred to effect the decay of this alliance, which however is not wholly dissolved at this day; as the cities of *Lubeck*, *Hamburgh*, and *Bremen*, maintain sufficient marks of that splendour and dignity with which this confederacy was anciently distinguished.

Hume's
Hist. of
England,
vol. iv. p.
348, 349.

Having thus taken a brief but comprehensive view of the most considerable maritime states both of ancient and modern times, I forbear to go more at length into the history of several governments, which have published naval regulations for the direction of their own subjects; because they are only binding within their own particular districts: they are very similar to those about which so much has been already said; they are all collected by *Magens* in the second volume of his *Essay on Insurances*, and are occasionally referred to in the course of the ensuing work. Besides, I hasten to give an account of the vast improvements which have been made in this country within these last thirty years, with respect to insurances, and which are the main object of this enquiry. It would, however, be improper, in a work of this nature, entirely to pass over the *French* nation, the maritime strength of which has of late years considerably encreased; and whose writers upon commercial affairs would reflect honour upon any country.

(a) Few people understand the theory of commerce better than our neighbours on the Continent; and yet they have not in practice come up to what might have been expected. It is true that *France* from her situation, from the bent of her people to certain manufactures, from the happiness of her soil, and her natural advantages, must be always possessed of a great internal and external trade, which must add greatly to her wealth, and render her the most respectable power on the Continent of *Europe*. But the *French* do not naturally possess that undaunted perseverance, which is necessary for commerce and colonization. It is besides a great disadvantage to the commerce of *France*, that as its government is military, the profession of a merchant is not so honourable as in *England*, so that the *French* nobility think that it would be beneath them to attend to the drudgery of trade, and that it would degrade their ancestry to allow any of their sons to follow the business of a merchant. The consequence of this is, that the church, the law, and the army, are stocked with the members of noble families; and the counting-house is by them entirely deserted. At one period, indeed, there was an appearance that *France* would make as illustrious a figure amidst the powers of *Europe* in trade, as she then did as a warlike nation. The period, to which I allude, was under the administration of the famous *Colbert*, who, next to *Henry* the Great, may justly be stiled the father of the *French* commerce and manufactures. This illustrious man, who was of *Scotch* extraction, descended of a family no way considerable by its splendour or antiquity, raised himself by his activity, diligence, and knowledge of commerce, to the first offices under the

Vie de
Colbert.

(a) It is hardly necessary to mention, that these observations were originally written long before any change had taken place, or been attempted, in the government of *France*.

government

government of *France*. Being appointed to the superintendence of the finances, he proposed such regulations as brought about the purpose he intended, the orderly and frugal management of them; and established the trade of *France* with the *East* and *West Indies*, from which she has reaped considerable benefits. He also patronized and encouraged the liberal arts and sciences, reformed the courts of justice, and introduced many important regulations, which regarded the order of society. But in 1669, when appointed secretary of state, and entrusted with the management of affairs relating to the sea, he had a full opportunity of exerting those talents, which he so eminently possessed, and for the exertions of which his name has been transmitted with so much honour to posterity. In order to gain a proper insight into the true effects of commerce upon the various nations of the world, and the advantages of some particular branches of trade, he procured and employed learned and diligent men to enquire into the commercial histories of cities long since destroyed, and the nature of the climate, soil, and productions of the countries then rising into notice. It was to this spirit of enquiry in this famous statesman, that the world is indebted, as appears from the dedication, for that very masterly performance upon the commerce and navigation of the ancients, written by *Huet*, bishop of *Avranches* and *Soissons*, who is justly entitled to a high rank among men of letters. *Colbert* having thus made use of the labours of others, in order to gain useful information, undertook to restore the navy and commerce of *France*; and he completed all his services by the publication of that excellent body of Sea laws, known by the name of the Ordinances of *Lewis* the 14th, which comprehend every thing relating to naval or commercial jurisprudence; and of which the doctrine of insurances forms a considerable part. To its merit all *Europe*

Huet Hist.
du Com-
merce et de
la Naviga-
tion des
Anciens,
pref.

Vie de
Colbert.

L'Honneur
Francois,
tom. 7.
p. 302.

has borne testimony; and the name of *Colbert* must ever be mentioned with respect, when the ordinances of *Lewis* the 14th are the subject of conversation (a).

These ordinances have had the good fortune to meet with a laborious commentator in *Valin*, who, being thoroughly sensible of the advantages which his country must necessarily derive from such an excellent code, has, with a degree of labour and industry which excite our admiration, and which are highly deserving of imitation, placed it in the most favourable point of view, has cleared up every obscurity, by tracing these laws to their ancient sources, and by a full investigation of old ordinances, and the decisions of former tribunals; has added much to the mass of learning upon subjects of this nature. But of all the sources, from which modern *French* legislators could derive the most essential information, the famous treatise called "*Le Guidon*" was the chief. This tract was republished by *Cleirac*, who pays a due compliment to its merits, in his work upon the Usages and Customs of the Sea: and although in its style and manner it certainly favours of the rust of antiquity; yet it contains the true principles of naval jurisprudence. If the style be antiquated, and the text be corrupted in some places, yet the treatise is still valuable by the wisdom which shines through the whole, and the number of decisions which it contains.

Cleirac,
p. 213.

L'Honneur
François,
par M. de
Sacy, tom. 7.
p. 302.

(a) It was under the administration of *Colbert*, that the *French* laid the foundation of *Quebec*, on the banks of the river *St. Lawrence*; and he performed a work, which, says a *French* historian, even in the eyes of *Richelieu*, seemed to surpass human power; and that it was to effect a junction between the *Atlantic* and the *Mediterranean*, by means of a canal, the execution of which attracted the admiration of *Europe*, and added much to the splendour of *French* commerce.

Upon

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Upon this occasion let me not forget to take proper notice of two very modern and distinguished *French* writers, M. *Pothier* and M. *Emerigon*. The former of these has written admirable dissertations upon every species of express and implied contracts, and amongst the rest upon that of insurance; he has considered his various subjects with so much clearness and perspicuity, and has produced so many apposite examples in support of the positions he advances, that they greatly contribute to the advancement of the knowledge of this branch of jurisprudence. His style is at the same time manly, neat, and classical; and well suited to didactic discourses (a).

Pothier, §
tom. quarto,
p. 1.

M. *Emerigon* has, in his work, confined himself to the consideration of marine insurances, and to the contract of bottomry only. This being the case, he has gone into those subjects much more at length than any former *French* writer; and has, with infinite labour, unwearied study and reflection, collected the decisions and authorities applicable to the purpose of his work. This learned foreigner, I understand, holds a distinguished rank among the advocates of his own country: and his treatise upon insurances will by no means diminish his fame.

Traité des
Assurances.

We have seen, that the naval reputation of the *English* was arrived at a great height in the twelfth century, for the laws of *Oleron*, of the merits of which much has been said, were at that time compiled by an

(a) The attention of *English* lawyers was first drawn towards the works of this eminent judge, by that distinguished luminary of our own country, Sir *W. Jones*, in his treatise on the *Law of Bailments*; and we have now an opportunity of perusing, in an *English* dress, *Pothier's* Treatise on the *Law of Obligations*; well translated, and accompanied by several very learned notes, illustrative of the *English* law on the subject, by *W. D. Evans*, Esq.

Hume's
Hist. of
Eng. off.
edit. vol. ii.
p. 494.

Robertson's
View of So-
ciety, &c.

English monarch, and received here as the regulator of naval affairs. The progress of commerce, however, in this country, was not answerable to so auspicious a beginning; for in the reign of *Edward* the Third, upwards of a century afterwards, commerce and industry were at a very low ebb. That monarch, struck with the flourishing state of the Northern provinces, which have been already described, and perceiving the true cause of their prosperity, endeavoured to excite a spirit of industry among his subjects, who seemed to be blind to the advantages of the situation, and ignorant of those sources, from which they might derive wealth and opulence. So far were they lulled by ignorance and indolence, that they did not even attempt those manufactures, the materials of which they themselves supplied to foreigners. Notwithstanding the endeavours of *Edward*, and the many wise establishments proposed and encouraged by him, it was not till the reign of *Elizabeth* that the *English* began to discover their true interests, and the arts by which they were to obtain that pre-eminence and rank, which they now hold among commercial nations. This slow progress of commerce in this country may be accounted for on various grounds. During the *Saxon* heptarchy, *England* was split into many kingdoms, perpetually at variance with each other; it was exposed to the fierce incursions of the Northern pirates; it was sunk in barbarity and ignorance; and consequently was in no condition to cultivate commerce, or to pursue any system of wise or useful policy. To this succeeded the *Norman* conquest, and all the consequences of a feudal government, military in its nature, hostile to commerce, and the arts and refinements of a liberal and civilized people. Scarce had the nation recovered from the shock occasioned by this revolution, when it was engaged in supporting its monarch's pretensions to the *French* crown, and it long continued to waste its vigour

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and wealth in wild endeavours to conquer that country. To this we may add the destructive civil wars between the houses of *York* and *Lancaster*, which long deluged the kingdom with blood: and to which a period was at last happily put by the union of their several titles to the crown in the person of *Henry* the Eighth. The reformation then took place under that monarch, and it was not till the reign of *Elizabeth*, that the feuds and dissensions which such an important event was likely to occasion, began to subside. During her long reign, and her wise and prudent administration of government, commerce began to rear its head, and found shelter and protection from the managers of public affairs. From this short sketch, it is not much to be wondered at, that *England* was one of the last nations of *Europe* which availed herself of her great commercial advantages: but she has since made ample amends for her long continued indolence and inactivity, by the amazing extent of her commerce, and the wise laws and regulations to be found in her system of maritime jurisprudence.

While commerce continued in this weak and languid state, it cannot be supposed that insurances, which spring from commerce, were at all encouraged or understood. It is true, that the *Lombards* came into *England* in the 13th century, and it is universally agreed, that whatever may have been the origin of insurances, they were introduced into *England* by that active and industrious people. This idea is countenanced and confirmed by the clause to this day inserted in all policies of insurance, "that this writing or policy of assurance shall be of as much force and effect as any writing heretofore made in *Lombard Street*, &c." the place where these *Italians* are known to have taken up their residence, and carried on their trade. The preamble to the statute of Queen *Elizabeth*,
which

i Anderson's Hist.
of Com.

Vide the
Appendix
No. 1.

6 Coke,
Rep. 47. b.

which will be presently mentioned, speaks of insurances as having existed time out of mind in this kingdom. Be this as it may, it is certain that prior to the reign of that princess very few insurances had been effected; or, if effected, no question had ever arisen upon them in any of the superior courts. So little were the judges acquainted with the nature of the contract, that so late as the 30 and 31st of *Elizabeth's* reign, it became a question where an action upon a policy of insurance should be tried, the policy having been effected in *London*, and the ship detained in the river *Soane* in *France*. The policy was on a ship from *Melcombe Regis*, in the county of *Dorset*, to *Abbeville* in *France*. The plaintiff declared, that the ship, in sailing towards *Abbeville*, to wit, in the river of *Soane*, was arrested by the king of *France*. The parties came to issue upon the question, whether the ship was so arrested or not: and it was tried before Lord Chief Justice *Wray*, in the city of *London*; and a verdict was found for the plaintiff. In arrest of judgment it was moved, that this issue arising merely from a place *out of the realm*, could not be tried in *London*. But it was resolved by the court, that this issue should be tried where the action was in this case brought: for the promise, which is the ground and foundation of the action, was made in *London*; and the arrest now in issue is not the ground of the action which is founded on the *assumpsit*, and the arrest is the breach of the *assumpsit*.

This is the most ancient case I have been able to find upon the subject of insurances; and I thought proper to insert it here, as the best proof that, prior to the reign of *Elizabeth*, this contract could have been very little, if at all known. We have seen, however, that under *Elizabeth*, the genius of *England* began to display itself: about which time also, the legislature began to think the regulation of matters of assurance

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an object well worthy their most serious attention; and it cannot but afford us much pleasure to find, that even in that early age the true principles upon which this species of contract is founded, and upon which it ought to be protected and encouraged in a commercial nation, were clearly and fully understood. In the preamble to an act of parliament, passed in the 43d year of the reign of Queen Elizabeth, *“ concerning matters of assurance used amongst merchants,”* the sense of the legislature upon the subject is expressed with clearness and perspicuity. After reciting, that it has ever been the policy of this nation to encourage trade, and that policies of assurance have existed time out of mind, it goes on to state the advantages to be derived from their encouragement in a commercial nation. “ By means of which policies of assurance, it cometh to pass upon the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many, than heavy upon few, and rather upon them that adventure not, than upon those who do adventure, whereby all merchants, especially those of the younger sort, are allured to venture more willingly, and more freely.”

43 Eliz.
ch. 12.

The purpose of that statute was, to erect a particular court for the trial of causes, relative to policies of insurance, in a summary way; and to that end the statute ordained, that a commission should issue yearly, directed to the Judge of the Admiralty the Recorder of London, two doctors of the civil law, two common lawyers, and eight merchants, empowering any five of them to hear and determine all such causes, arising in London; and it also gave an appeal from their decision, by way of bill, to the court of Chancery. But this statute not entirely answering the intention of the legislature, some further regulations were made by a

23 and 24
Car. 2. ch.
23.

subsequent statute: such as the reduction of the number necessary to constitute a quorum. I forbear entering at length into this matter, the court erected by these statutes being now entirely disused. The reasons of this may be collected from some few decisions in our reporters: but one appears on the face of the statute itself: namely, that its jurisdiction was not sufficiently extensive, being confined to such causes only as arose in London.

Bentley v.
Oyle, Style,
266.

By a case reported in *Style* we find, that a prohibition issued to the court of policies of insurance, to prevent it from proceeding in a case of insurance upon a life, the Court of King's Bench being of opinion, that the statute only meant to give the court below cognizance of such contracts only as related to merchandize.

Dalbie v.
Proudfoot,
1 Shower,
396.

In another case it seemed to be the opinion of the Court of King's Bench, that the jurisdiction of this newly erected court did not extend to suits brought by the assurer against the assured; but only to such as were prosecuted by the latter against the former. It is true, in Sir *Bartholomew Shower's* note of the case, no decision appears to have been made; but a rule to shew cause why a prohibition should not issue was obtained; and no notice is afterwards taken of it, although the learned reporter was himself the counsel in the cause, who had obtained the original rule.

Cum v.
Moy, 2 Sl.
darda, 121.

But a case reported in *Siderfin*, seems to have struck a more severe blow at the existence of this court than any of those cases I have mentioned; for it was there held, that it was no bar to an action upon a Policy of Insurance at the common law to say, that the plaintiff had sued the defendant for the same cause in the court erected,

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erected by the statute of *Elizabeth*, and that his suit was there dismissed.

These causes co-operating together, probably with some instances of partiality in the judges, this court fell into disuse, no commission having issued for many years; but insurance causes are now decided, like all other questions of property, and by that mode of trial most agreeable to the nature of our constitution, by a trial in a court of common law.

Lex Merc.
Red. 4th
edit. p.
192.

It has been much the fashion of late years to insist upon the advantages, which the trading part of the nation would derive, from the establishment of some equitable and amicable judicatory for the trial of all disputed points in matters of insurance. This is only another proof of the weakness and fallibility of the human mind, which is never satisfied with the enjoyments within its reach, however excellent they may be; but pants after those of foreign growth. Thus, a people who are possessed of a species of trial, the best calculated for the discovery of truth, and the advancement of justice, and which has excited the admiration of the world, are desirous of parting with such an advantage for a mode of trial, which is very unsatisfactory.

The court erected by the statute of *Elizabeth*, and which has now fallen into disuse, is perhaps one of the strongest arguments, that can be adduced to prove, that such a judicature is not congenial to the spirit and dispositions of *Britons*, nor well adapted for the purposes of its institution. It is universally agreed by all writers upon jurisprudence, that nothing tends so much to the elucidation of truth, and the detection of fraud,

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as the open *viva voce* examination of witnesses, in the presence of all mankind: before judges, who, from their knowledge of books and men, acquired by long study and experience, are well qualified to discriminate and decide between right and wrong; and before twelve upright citizens, who have an opportunity of observing the appearance, countenance, inclination, and deportment of those who are thus examined upon oath. Besides the subjects of those states, which have established these equitable tribunals, sensible of the superior advantages of the *English* institution, feeling that in great mercantile questions, the greatest attention is paid to the eternal and immutable principles of reason, and that all men, whether natives or foreigners, here meet with an equal measure in the administration of justice, fly to this country to make their contracts of insurance, that in case of a dispute, they may have the benefit of its laws. Did it fall within the compass of this inquiry, I could relate many cases, of the truth of which I have not the smallest reason to doubt, which would serve to shew the idea entertained by foreigners of our mercantile jurisprudence, and the high repute and estimation in which our judges are justly held by the *European* nations.

But though the court of Policies of Assurance has been long disused; though it is near a century since questions of this nature became chiefly the subject of common law jurisdiction; yet I am sure I rather go beyond bounds, if I assert that in all our reporters from the reign of Queen *Elizabeth*, to the year 1756, when Lord *Mansfield* became Chief Justice of the King's Bench, there are 60 cases upon matters of insurance. Even those cases which are reported, are such loose notes, mostly of trials at *Nisi Prius*, containing

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taining a short opinion of a single judge, and very often no opinion at all, but merely a general verdict, that little information can be collected upon the subject. From hence it must necessarily follow, that as there have been but few positive regulations upon insurances, the principles, on which they were founded, could never have been widely diffused, nor very generally known.

This was owing to some defects, which were discoverable in the proceedings in our courts, and in the delays and expences which suitors experienced; so that they rather chose to submit to their first loss, than be harassed by the delays of the law, or be at the expence of trying a question, of which the decision might perhaps be of less moment to the individual than to the public. These defects were so glaring, that it was one of the first acts of Lord *Mansfield's* administration to apply a remedy; and his labours have been happily attended with such success, that they have been of essential service to the nation in general, considered in a commercial light, and have excited the applause and approbation of *Europe*.

Before the time of this venerable judge, the legal proceedings, even on contracts of insurance, were subject to great vexations and oppressions. If the underwriters refused payment, it was usual for the insured to bring a separate action against each of the underwriters on the policy, and to proceed to trial on all. The multiplicity of trials was oppressive both to the insurers and insured; and the insurers, if they had any real point to try, were put to an enormous expence, before they could obtain any decision of the question which they wished to agitate. Some underwriters, who thought they had a sound defence, and who were de-

2 Bernard.
B. R. 103.

sirous of avoiding unnecessary costs or delay to themselves or the insured, applied to the court of King's Bench to stay the proceedings in all the actions but one, undertaking to pay the amount of their subscriptions with costs, if the plaintiff should succeed in the cause which was tried; and offering to admit on their part every thing which might bring the true merits of the case before the court and jury. Reasonable as this offer was, the plaintiff, either from perverseness of disposition, or the illiberality and cunning of his advisers, refused his consent to the application. The court did not think themselves warranted to make such a rule without his consent; but Mr. Justice *Denison* intimated that if the plaintiff persisted, against his own interest, in his right to try all the causes, the court had the power of granting imparlances in all but one, till there was an opportunity of trying that one action. Lord *Mansfield* then stated the great advantages resulting to each party by consenting to the application which was made; and added, that if the plaintiff consented to such a rule, the defendant should undertake not to file any bill in equity for delay, nor to bring a writ of error (a), and should produce all books and papers that were material to the point in issue. This rule was afterwards consented to by the plaintiff, and was found so beneficial to all parties, that it is now grown into general use; and is called The Consolidation Rule. Thus on the one hand, defendants may have questions of real importance tried at a small expence; and plaintiffs are not delayed in their suits by those arts, which have too frequently been resorted to in order to evade the payment of a just demand.

(a) The Court of Common Pleas were unanimously of opinion, after consideration, that a defendant who had entered into the consolidation rule, could not bring a writ of error at all, although there be manifest error upon the record. *Camden v. Edie*, 1 H. Blac. Rep. 21.

In former times, the whole of the case was left generally to the jury, without any minute statement from the bench of the principles of law, on which insurances were established; and as the verdicts were general, it was almost impossible to determine from the reports we now see upon what grounds the case was decided. Nay, even if a doubt arose in point of law, and a case was reserved upon that doubt, it was afterwards argued in private at the chambers of the judge who tried the cause, and by his single decision the parties were bound. Thus, whatever his opinion might be, it never was promulgated to the world; and could never be the rule of decision in any future case.

Lord *Mansfield* introduced a different mode of proceeding; for in his statement of the case to the jury, he enlarged upon the rules and principles of law, as applicable to that case; and left it to them to make the application of those principles to the facts in evidence before them. So that if a general verdict were given, the grounds, on which the jury proceeded, might be more easily ascertained. Besides, if any real difficulty occurred in point of law, his Lordship advised the counsel to consent to a special case. In a special case, the facts are either admitted by the parties, or if they are disputed, are proved; and then the judge takes the opinion of the jury upon these facts, reserving the question of law to be agitated elsewhere. These cases are afterwards argued, not before the judge in private, but in open court before all the judges of the bench from which the record comes. Thus nice and important questions are now not hastily and unadvisedly decided; but the parties have their case seriously considered and debated by the whole court; the decision becomes notorious to the world; it is recorded for a precedent of law arising from the facts found, and serves as a rule to guide the opinion of future judges.

It had also been the custom, when cases were reserved, to leave it to the counsel on both sides to draw them up at their leisure. This introduced considerable delays; for every fact became again a subject of dispute; and frequently from the hurry of business and other avocations of the counsel, the case was neglected for a considerable time, before it was ready for the inspection of the court.

Now, whenever, a case is reserved, the judge himself dictates to the clerk of the court the facts which ought to be stated, and the question upon which the opinion of the court is required: and in addition to this Lord *Mansfield*, whose rules are now the subject of our enquiry, ordered that all cases so reserved must be set down for argument within the first four days of the term following the trial; otherwise the judgment must be entered according to the finding of the jury.

Raynard v.
Chase,
a Buryow 5.

One additional improvement in the proceedings remains to be mentioned. Before Lord *Mansfield's* time, it was almost a matter of course not to decide any case, without hearing two arguments upon it: but in the very first cause which is reported of his Lordship's decisions, he expressed himself to this effect: "Where
" we have no doubt, we ought not to put the parties
" to the delay and expence of a further argument, nor
" leave other persons who may be interested in the
" determination of a point of a general nature, unnecessarily under the anxiety of suspense." When we add to these wise regulations the consideration that Lord *Mansfield*, during his long administration of justice, gave up a great part of his time, and employed his talents in the elucidation of those points, which tend to fix the system of mercantile jurisprudence upon the surest grounds, we need not wonder that that part
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of it which relates to marine insurances, has attained to its present state of perfection.

A complete system of jurisprudence cannot be suddenly erected : but there is rather matter to excite our wonder that so much has been done in this respect within the last 40 years (*a*), than ground to complain that little has been effected. It is the boast of this age, that in it the great foundations of maritime jurisprudence have been laid, by clearly developing the principles on which policies of insurance are founded, and by happily applying those principles to particular cases. It will be the business of the following work, which professes to lay down a system of the law as it now stands, to point out, among other things, the improvements which have been made by the legislature from time to time on the system of insurances, by many wise statutes and salutary restrictions ; and to prove, that the learned judges of the courts both of law and equity, by their liberal and equitable construction of those statutes, and by adopting the true principles of commerce in their decision of the many intricate cases which have been brought before them, have added another pillar to that beautiful structure of rational jurisprudence, which has deservedly acquired the admiration of mankind.

(*a*) This work was originally published in 1787.



CHAPTER THE FIRST.

OF THE POLICY.

POLICY is the name given to the instrument, by which the contract of indemnity is effected between the insurer and insured; and it is not, like most contracts, signed by both parties, but only by the insurer, who on that account, it is supposed, is denominated an underwriter. Notwithstanding this, there are certain conditions, of which we shall hereafter have occasion to speak, to be performed as well by the person not subscribing, as by the underwriter, otherwise the policy will be void. Of policies there seem to be two kinds, *valued* and *open* policies; and the only difference between them is this, that in the former, goods or property insured are valued at prime cost at the time of effecting the policy; in the latter, the value is not mentioned: that in case of an open policy, the real value must be proved; in a valued policy it is *agreed*, and is just as if the parties had admitted it at the trial.

C H A P.
I.

Although policies of insurance are not to be ranked with specialty contracts, not being under seal, yet they have always been held as sacred agreements, and of the first credit: so much so, that when once they are underwritten, they cannot be altered by either party; because it would open a door to an infinite variety of frauds, and introduce uncertainty into a species of contract, of which certainty and precision are the most essential requisites.

Skinn. 54.

In a case before Lord Chancellor *Hardwicke*, this doctrine was admitted in its full extent. The plaintiff had insured a ship at and from *London* to *Ostend*, from thence to *Rotterdam*, from thence to the *Canaries*, warranted an *Ostend* ship, which ship was afterwards taken. The bill was brought to have the policy rectified, for that the intention of the parties was mis-

Henkle v.
The Royal
Exch.
Assur.
Company.
1 Ves. 317.

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taken therein, which was, that the warranty was too general, and that the voyage should have been stated to take place from *Ostend* only, and not from *London*. The evidence in this case was the deposition of *Knox*, the agent for the company; who deposed that the plaintiff applied to him to insure the ship, and that he believed the plaintiff told him, she was, or had been an *English* ship, and might say something concerning the manner or intent of making her an *Ostend* ship; but that his answer was, that he would not enter into the manner, but that if the plaintiff would warrant her to be an *Ostend* ship, he would insure; and that on those terms, and no other, the agreement was made. There was the evidence of another person, who varied from *Knox*; in addition to which it was said, there was the evidence arising from circumstances, for that it was impossible for the plaintiff to intend to insure her as an *Ostend* ship, she being then in *London*, and could not be an *Ostend* ship without going to *Ostend*; for which proof was read that it was necessary she should be registered.

Lord Chancellor.—“The first question is, Whether it sufficiently appears to the court, that this policy, which is a contract in writing, has been framed contrary to the intent and real agreement? It is certain, that to come at that, there ought to be the strongest proof possible, for the agreement is twice reduced into writing in the same words, and must have the same construction: and yet the plaintiff seeks, contrary to both these, to vary them, and that in a case, where his witnesses vary from each other. The single deposition, upon which it depends, is very uncertain; and imports, that they relied on the plaintiff's warranty, leaving the transaction relating to the manner of making her an *Ostend* ship entirely to himself. His Lordship, therefore, as there was no evidence to vary the contract from the written words, ordered the bill to be dismissed.”

At the same time it must be observed, that cases frequently may, and do exist, in which a policy, upon proper evidence, may be altered, without any violation of the principles above laid down, and which has been often done by the courts both of law and equity; for let it be remembered once for all, that in questions of insurance, which is a contract founded upon broad equitable principles, courts of common law are bound by the

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the same rules of decision as courts of equity. After signing, policies are likewise frequently altered by *consent* of the parties, and such policies are good, agreeable to the maxim, *consensus tollit errorem*. C H A P.
I.

An instance of the former kind of alteration of a policy occurs in the chancellorship of Lord *Hardwicke*, to whose decision we last referred. The insurance was upon the ship five hundred pounds, and the policy stated, that the adventure was to commence immediately *from the departure of the ship from Fort St. George to London*. The bill was brought by the plaintiff, suggesting that the owner had employed a *Mr. Halhead* to insure the ship with the defendants, to commence *from her arrival at Fort St. George*: that a label, agreeable to those instructions, with all the particulars of the agreement, had been entered in a book, and subscribed by *Halhead*, and two of the directors of the company; that by a *mistake* the policy was made out different from the label; that the ship being lost in the Bay of Bengal, after her arrival at Fort St. George, but before her departure for England, the company refuse to pay; upon the suggestions, the plaintiff prayed that the mistake might be rectified, and that the company might be ordered to pay five hundred pounds with interest.

Motteux v. the Gov. and Comp. of the London Assurance, 1 Atkyns 545

His Lordship was of opinion, that the label was a memorandum of the agreement, in which the material parts of the policy were inserted; that although the policy was ambiguous, the label made it clear; and as it was only a mistake of the clerk, it ought to be rectified according to the label.

In an action upon a policy of insurance, and *non assumpsit* pleaded, the facts were, that *Stubbs*, a broker, had instructions to procure an insurance on goods on board the *Mary Galley*, of *Saint Christopher's*, Captain *A. Hill*, commander: that *Stubbs*, in writing the policy, by mistake, made the insurance on the *Mary*, Captain *Hastlewood*, commander, which was subscribed by the defendant: that the *Mary Galley* was lost, and then *Stubbs* applied to the insurers to consent to alter the policy, to which they agreed. It was urged, that on account of the alteration, the defendant should have an increase of premium, the

Bates v. Grabham, Salk. 444

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ship *Mary* being stouter than the *Mary Galley*. But *Holt*, chief justice, ruled, that the action well lay upon the policy, and that the mistake might be set right.

A policy of insurance, when effected, becomes the property of the insured: and if it be *wrongfully* withheld, either by the broker employed by him to effect it, or by any other person to whose hands it may happen to come, he may maintain an action of trover for it, as well as for any other species of property.

Harding v.
Carter and
another,
Sittings at
Guildhall,
Easter Vac-
cation,
1781.

Thus an action of trover was brought against the defendants for two policies of insurance. The defendants were brokers, who had written to the plaintiff, the master of a vessel, that they had got two policies effected; the one on account of the plaintiff's cloaths and wages, the other on account of the owners, and that the underwriter was Mr. *Newnam*. A loss having happened, the defendant produced a policy, underwritten by one *J. S.* only insuring the ship, in which the plaintiff had no interest.

Lord *Mansfield*.—"I shall consider the defendants as the actual insurers; and therefore the plaintiff must prove his interest and loss. The defence set up was, that the letter above stated in evidence was written by the defendant's clerk through mistake; and it was said, that trover could not be maintained for that which never existed: but his Lordship would not suffer the defendants now to contradict their own representation; and the plaintiff accordingly had a verdict to the amount of his interest, the premium being deducted."

It is material to observe, that policies of insurance, though called *written* instruments, are, for the convenience of trade, and the dispatch of business, generally printed, leaving blanks for the insertion of names and all other requisites. This being the case, it is frequently necessary to insert written clauses, in order to express the meaning of the parties to the contract, which, from some particular circumstances, the printed form may not sufficiently explain. These written clauses and conditions, thus inserted, are to be considered as the real contract; the court will look to them to find out the intention of the parties,

parties, and will consequently suffer such conditions to controul the printed words in policies of insurance *.

C H A P.
I.
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Having premised thus much of policies in general, it may be proper to consider this subject in a threefold point of view : First, what persons may be insurers : Secondly, what things may be insured ; Thirdly, what the requisites of a policy are.

1st. What persons may be insurers. It should seem, that by the common law and usage of merchants, any person whatever might be an insurer, however unable he might be, from poverty, to make up the losses insured against, provided the merchant was weak enough to trust to such a security. In process of time, however, there were so many who made a shew of great wealth, in order to deceive the honest and unsuspecting trader out of his premiums, and who were in insolvent circumstances, that it became an object of national concern, and parliamentary interference. The mischiefs then existing in this branch of trade, and the dangerous consequences thence arising to the interests of the country, are to be collected from the preamble of the statute, which passed in the reign of George the First, to remedy these evils, and which has in some, though not in any great degree, restrained the rule of the common law as to the unlimited right any man or body of men had to become insurers. “ Whereas it has been found by experience, that many particular persons, after they have received large premiums or consideration monies for or towards the insuring of ships, goods, and merchandizes at sea, have become bankrupts, or otherwise failed in answering or complying with their policies of insurance, whereby they were particularly engaged to make good, or contribute towards the losses which merchants and traders have sustained to the ruin and impoverishment of many merchants and traders, and to the discouragement of adventurers at sea, and to the great diminution of the trade, wealth, strength, and publick revenues of the kingdom : And whereas it is conceived, that if two several and distinct corporations, with a competent

6 Geo. I.
c. 18.

* See the effect of the written and printed clauses in a policy of Insurance very fully explained by Lord Ellenborough in giving judgment, in a cause of *Robertson v. French post*, Cb. 2, *Of the construction of a Policy of Insurance*.

C H A P. I. " joint stock to each of them belonging, and under proper con-
 " ditions, restrictions, and regulations, were erected and esta-
 " blished for assurance of ships, goods, or merchandizes at sea,
 " or going to sea, (exclusive of all or any other corporations
 " or bodies politic already created, or hereafter to be created,
 " and likewise exclusive of such societies or partnerships as now
 " are, or may hereafter be entered into for that purpose,)
 " several merchants or traders, who adventure their estates,
 " or part of their estates, in such ships, goods, and merchan-
 " dizes, at sea, or going to sea, (especially in remote or ha-
 " zardous voyages,) would think it much safer for them to de-
 " pend upon the policies or assurances of either of those two
 " corporations, so to be erected and established, than on the
 " policies or assurances of private or particular persons." The
 statute then goes on to authorize his majesty to grant charters
 to two distinct companies or corporations, for the assurance of
 ships, goods, and merchandizes, at sea, or going to sea, and for
 lending money on bottomree. The statute also enacts that the
 corporations may purchase lands to the amount of one thousand
 pounds *per annum*, may have a common seal, and may be capa-
 ble to sue and be sued at law; that each corporation shall pro-
 vide a sufficient stock of ready money to satisfy and discharge all
 just demands, arising upon their policies of insurance; and in
 case of refusal, the parties insured may bring their action against
 the corporation, and shall recover *double damages* and costs.
 This clause, however, giving double damages, was afterwards
 thought by the legislature to be hard and oppressive; and there-
 fore, by a clause in a subsequent statute, these corporations
 were allowed to plead the general issue to any action brought
 against them; and the jury, in estimating the damages, as well
 with respect to them as any other persons, were left to their
 own discretion.

3 Geo. I.
 c. 15. f. 25.
 31 Geo. I.
 c. 30. f. 43.

Vide post,
 c. 20.

Sec. 12.

After several other clauses for the internal regulation of these
 corporations, the statute of the sixth of *Geo.* the First goes on
 to prohibit any other society or partnership whatsoever from
 making insurances, or lending money on bottomree. " And
 " be it enacted, that, from and after the granting or making
 " the said charters or indentures for erecting the two corpora-
 " tions before mentioned, and passing the same under the great
 " seal, for and during the continuance of the said corporations
 " respec-

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I.

“ respectively, or either of them, all other corporations or bodies
 “ politick, before this time erected or established, or hereafter to
 “ be erected or established, whether such corporations or bodies
 “ politic, or any of them, be sole or aggregate, and all such
 “ societies and partnerships as now are, or hereafter shall or
 “ may be, entered into by any person or persons, for assuring
 “ ships or merchandizes at sea, or for lending money on bot-
 “ tomree, shall, by force and virtue of this act, be restrained
 “ from granting, signing, or underwriting any policy of assur-
 “ ance, or making any contracts for assurance of or upon any
 “ ship or ships, goods, or merchandizes, at sea, or going to sea,
 “ and for lending any monies by way of bottomree as aforesaid :
 “ and if any corporation or body politick, or persons acting in
 “ such society or partnership (other than the two corporations
 “ intended to be established by this act, or one of them) shall
 “ presume to grant, sign, or underwrite, after the twenty-fourth
 “ day of *June 1720*, any such policy or policies, or make any
 “ such contract or contracts for assurance of or upon any ship
 “ or ships, goods or merchandizes, at sea, or going to sea, or
 “ take or agree to take any premium or other reward for such
 “ policy or policies, every such policy and policies of assurance
 “ of or upon any such ship or ships, goods or merchandizes,
 “ shall be *ipso facto* void, and all and every such sum or sums so
 “ signed and underwritten in such policy or policies shall be
 “ forfeited, and shall and may be recovered, one half to the use
 “ of his majesty, the other to that of the informer, by action ;
 “ and if any corporation or bodies politick, or persons acting
 “ in such society or partnership, other than the two corporations
 “ intended to be erected by this act, or one of them, shall pre-
 “ sume to lend, or agree to lend, or advance, by themselves or
 “ any others on their behalf, after the said twenty-fourth day
 “ of *June 1720*, any money by way of bottomree contrary
 “ to this act, the bond or other security for the same shall be
 “ *ipso facto* void, and such agreement shall be adjudged to
 “ be an usurious contract, and the offenders therein shall
 “ suffer as in cases of usury: nevertheless it is intended and
 “ hereby declared, that any private or particular person or
 “ persons shall be at liberty to write or underwrite any po-
 “ licies, or engage himself or herself in any assurances of, for,
 “ or upon any ship or ships, goods or merchandizes at sea,
 “ or going to sea, or may lend money by way of bottomree,

C H A P. " as fully and beneficially, as if this act had never been made,
 I. " so as the same be not on the account or risque of a cor-
 " poration or body politick, or upon the account or risque of
 " persons acting in a society or partnership for that purpose as
 " afore said."

Sullivan v.
 Greaves,
 Sittings
 after Easter
 1789.

Upon this clause of the statute, a question arose at *Guildhall*. It was an action brought against the defendant to recover a sum of money received by him from one *Briflow* to the plaintiff's use. The plaintiff was an underwriter, and the defendant was a broker; and a loss having happened upon a policy underwritten by the plaintiff, he had been obliged to pay it: but *Briflow*, having agreed to take half the plaintiff's risk, had paid his moiety of the loss into the hands of the defendant, to recover it from whom this action was brought,

Lord *Kenyon*, C. J.—" I am of opinion that the plaintiff cannot recover; for this is clearly a partnership within the act of parliament. If a single name appears on the policy, as in this case, the insurer shall never be allowed; if a loss happen, to defeat a *bond fide* insurance, by saying to an innocent person, there was a secret partnership between another and myself, and therefore the policy is void. But here the plaintiff is himself the underwriter, who comes to enforce an illegal contract: it is a partnership *pro hac vice*: and this party cannot apply to a Court of Justice to enforce a contract founded in a breach of the law."

No motion was ever made to set aside the nonsuit; but two or three days afterwards, Lord *Kenyon* took occasion to mention to the bar, that he had stated the case to the other Judges of the court of *King's Bench*, who were unanimously of the same opinion with his Lordship.

Mitchell
 and others,
 assignees of
 Robertson a
 bankrupt, v.
 Cockburn,
 assignee of
 Tyler a
 bankrupt,
 a lit. disc.
 579.

In a more modern case, the decision in *Sullivan v. Greaves* came under discussion in the court of *Common Pleas*, and the opinion given by Lord *Kenyon* was confirmed by the unanimous opinion of that Court.

The facts were, that the two bankrupts were engaged in a partnership for the insurance of ships, which was carried on in
 the

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the name of *Robertson*, who, at the time of his bankruptcy, had paid a much larger sum for losses than he had received for premiums: and to recover a moiety of this sum from *Tyler's* estate was the object of this action. The Lord Chief Justice *Eyre* having nonsuited the plaintiffs at the trial, and a motion having been made to set the nonsuit aside, the learned Judges, after argument at the bar, delivered their opinions. C H A P.
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Ld. Ch. J. *Eyre*.—"This question depends on the true construction of the stat. 6 Geo. 1. c. 18. By that act, the two corporations became the purchasers of the exclusive privilege of insuring on a joint stock; and to give effect to that privilege, all other persons are prohibited from insuring on a joint stock. Now it appears clearly on the first view, that the provisions of the act are at an end, if a person, by merely insuring in his own name, can have the advantage of a joint capital, which the act meant to prohibit. This partnership therefore is contrary to the spirit of the act; and it is also contrary to the letter of it. The 12th section directs, that all societies, &c. * This does not at all go to confine the meaning of the legislature to an avowed partnership, insuring publickly in their own names; but the object is to prevent any other joint stock being embarked in insuring. This being so, the consequence unavoidably is, that no contract can arise directly out of such a proceeding, so as to be the foundation of an action,"

Mr. J. *Heath*.—"I am of the same opinion. It seems to me that the object of the statute would be totally defeated, if it were to extend only to those policies, in which the names of all the partners were inserted. It expressly declares, that every policy subscribed by any person acting in a partnership shall be absolutely null and void, though it may be true that the party subscribing shall be estopped from setting up a secret partnership to defeat a *bond fide* insurance. And the reason is obvious; trade is carried on according to the capital employed. Now the insurances would run to the extent of the capital, in whatever name the policy might be subscribed. The object therefore of the statute was to prevent the employment of a joint capital, which would afford the greatest competition with the established corporations."

* Vide Supra, p. 6.

Mr.

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Mr. J. *Rooke*.—"As to the second point, I agree that if the contract be illegal, no action can arise out of it. But as to the first question, whether this contract were illegal or not, I must confess I had great doubts, till I heard the opinions of my Lord Chief Justice and my brother *Heath*, and also the case cited from *Park's Insurance*, for it seemed to me that the statute only meant to prohibit insurances where both parties knew that a partnership existed, but not where there was a sleeping partnership. But I was very much struck with the observations of my brother *Heath*, that the extent of the insurance would be in proportion to the capital employed, and if there were an increased capital there would be an increased rivalry with the corporations. Whatever doubts therefore I had, I submit to the authority of the other Judges."

Booth v.
Hodgson,
6 Term
Rep. 405,
Acc.

Rule for setting aside the nonsuit was discharged.

Aubert v.
Mase,
2 Bof. &
Pull. 371.

In a subsequent case, all these cases were considered and fully confirmed in the Court of *Common Pleas*, by Lord *Eldon*, *Heath*, *Rooke*, and *Chambre*, Justices.

Lees v.
Smith,
7 Term R.
338.

The rule then established by all these cases seems to be this, that if the credit of any company or society (except the two mentioned in the statute) be in any event pledged in a contract of this nature, the contract is void. And therefore where a company of ship owners engaged to insure each other's ships, though they covenanted *severally*, and not *jointly* to pay a certain sum in case of loss in proportion to their respective shares, yet as there was a clause providing that in case of the insolvency of any one of the members, all the others were to be responsible, the contract was void.

Harrison v.
Millar,
Sittings
after Mich.
1796.
7 Term R.
p. 340.
note (d).

But if in such an association, each individual subscriber is only liable for the sum to which his name appears, and not for the default of the other subscribers, it has been held by Lord *Kenyon*, that such an association does not infringe on the act of parliament.

Sec. 24. 26.
28.

There are clauses, in a subsequent part of the statute now under discussion, securing to the *South Sea* and *East India* Companies, all

all the rights and privileges which they had enjoyed previous to the passing of that act, and the right of lending money on-bottomree to the captains of their own ships.

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This statute is the only positive regulation to be found in the law of this country, with respect to what persons shall, or shall not be insurers. By virtue of that act, the two offices, under the names of the *Royal Exchange Assurance Offices*, and the *London Assurance Office*, were created and established, by charter of *George the First*, under the great seal of *Great Britain*, bearing date the twenty-second day of *June*, in the sixth year of his reign; and they still continue offices for the insurance of property. The legislature having thus anxiously provided for the security of those merchants, who might be desirous of carrying on an extensive trade, but who were deterred from doing so through fear of the insolvency of underwriters, having stipulated with the company that they should have sufficient funds for the payment of all demands that might be made, and at the same time, allowing to private underwriters the full liberty of insuring to any amount with those who were satisfied to trust to their private securities only; it is not to be wondered at, that the business of insurance increased to a degree almost inconceivable. Indeed, any person, since this statute, may insure as at the common law, with this single exception, that any policy subscribed by a private firm or partnership, is absolutely void.

2dly, What things may be insured. I beg leave here to premise, that I do not mean at present to go into the great question of insurance, *upon interest or no interest*, having reserved that for the subject of a distinct chapter. My design in this place is only to shew, what kinds of property are the subject of insurance, upon supposition that every person, making insurance, is interested in the thing insured as the law requires.

The most frequent subjects of insurance are ships, goods, merchandizes, the freight or hire of ships: also houses, warehouses, and the goods laid up in them from danger by fire: and insurance on lives. Of the two last of which, more will be said hereafter. But although insurances upon such property, as we have just enumerated, most frequently occur in practice; yet in the

1 Agents.
4.

See post,
chap 22,
and 23.

C H A P. the law books we meet with cases which can hardly fall within
 I. any of those descriptions.

Thus bottomree and *respondentia* are a particular species of property which may be the subject of insurance. But then it must be particularly expressed in the policy to be *respondentia* interest; for under a general insurance on *goods*, the party insured cannot recover money lent on bottomree. Such has been, and is at this day, the established usage of merchants.

Glover v.
 Black,
 3 Burrow,
 1394. and
 1 Blackstone
 Rep. 405.

This was solemnly decided in an action upon a policy of insurance "upon *goods and merchandizes*, loaden, or to be loaden " aboard the *Denham*, *William Tryon*, commander, at and " from *Bengal*, to any ports or places whatsoever in the *East Indies*, until her safe arrival in *London*." The evidence appeared to be, that before the signing of the policy, the plaintiff had lent Captain *Tryon*, upon the *goods*, then loaden, and to be loaden on board the said ship, on account of the said Captain *Tryon*, the sum of seven hundred and sixty-four pounds, at *respondentia*, for which a bond was executed in the usual form: that the ship, at the time of the loss, had goods and merchandizes on board, the property of Captain *Tryon*, of greater value than all the money he had borrowed: that the ship was afterwards burnt, and all the goods and merchandizes were totally consumed and lost. Upon these facts, the question was, Whether the plaintiff could recover? This case was twice argued at the bar; the court took time to consider it, and were unanimous in their determination.

Lord *Mansfield*.—"I inclined at the trial, and since upon the argument, to support this insurance, being convinced that it is fair, and that the doubt has arisen by a slip in omitting to specify (as it was intended to have been done) that this was a *respondentia* interest. The ground of supporting this insurance, if it could have been supported, was a clause of the 19 G. 2. c. 37. §. 5. which, as to the purpose of insurance, considers the borrower as having a right to insure only for the surplus value, over and above the money he has borrowed at *respondentia*. Yet we are all satisfied that this act of parliament never meant, or intended to make, any alteration in the manner of insurances;
 its

Its view was to prevent gaming or wagering policies, where the insurer had no interest at all; and if the lender of money at *respondentia* were to be at liberty to insure for more than his whole interest, it would be a gaming policy; for it is obvious, that if he could insure all the goods, and insure his *respondentia* interest besides, this would amount to an insurance beyond his whole interest. In describing *respondentia* interest, the act gives the lender *alone* a right to make insurance on the money lent: so that the act left it on the practice. I have looked into the practice, and I find, that bottomree and *respondentia* are a particular species of insurance in themselves, and have taken a particular denomination. I cannot find even a *dictum* in any writer foreign or domestic, that the *respondentia* creditor may insure upon the goods, *as goods*. I find too, by talking with intelligent persons very conversant in the knowledge and practice of insurances, that they always do mention *respondentia* interest, whenever they mean to insure it. It might be greatly inconvenient to introduce a practice *contrary to general usage*, and there may be some opening to fraud if it be not specified. The ground of our resolution is, "That it is now established, as the law and practice of merchants, that *respondentia* and *bottomree* must be specified and mentioned in the policy of insurance."

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It is to be observed, that in this judgment the court confined itself entirely to the case then before it, but did not mean to decide, that a person, having a special interest in goods, could not recover under an insurance upon goods generally. Lord *Mansfield*, indeed, expressly said, at the conclusion of his argument, that they did not mean to determine, that no special interest in goods might be given in evidence, in other cases than in those of *respondentia* and *bottomree*, if the circumstance of the case should happen to admit of it. The lien which a factor, to whom a balance is due, has upon the goods of his principal, comes under the exception taken by the court; and an insurance upon such an interest seems to have been admitted, if not absolutely held, to be good, in the case of *Godin v. London Assurance Company*, which will be fully stated in that part of this work which treats of double insurances.

3 Bur.
1401.1 Bur.
439.

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I.

But although the decision in *Glover and Black* has never been called in question, yet it has since been ruled, that money expended by the captain for the use of the ship, and for which *respondentia* interest was charged, may be recovered under an insurance on *goods, specie, and effects*, provided the usage of the trade, which in matters of insurance is always of great weight, sanctions it.

Gregory v.
Christie,
B. R. Tri-
nity 24
Geo. III.

Thus in an action upon a policy of insurance on *goods, specie, and effects* of the plaintiff, who was also the captain, on board the ship, the plaintiff claimed under that insurance, money expended by him in the course of the voyage for the use of the ship, and for which he charged *respondentia* interest.

Lord *Mansfield*, after delivering his opinion upon another point, which arose in the cause, and which will be mentioned in another part of this work, said, as to the second question, whether the words, "*goods, specie, and effects*" extended to this interest, I should think not, if we were only to consider the words made use of. But here there is an *express usage*, which must govern our decision. A great many captains in the *East India* service swear, that this kind of interest is always insured in this way, and I observe the person here insured is the *captain*.

Magens,
18.

By the maritime regulations of most, if not of all, the trading powers in *Europe*, insurances upon the wages of seamen are forbidden; a regulation founded in wisdom and sound policy. In *Great Britain*, a great and commercial nation, such an ordinance is particularly necessary, and it is agreeable to the policy of the general law of that country, by which it is declared, "That no master or owner of any merchant ship shall pay to any seaman, beyond the seas, any money or effects on account of wages, exceeding one moiety of the wages due, at the time of such payment, till such ship shall return to *Great Britain* or *Ireland*." By this salutary law, the sailors are interested in the return of the ship; they will, on that account, be prevented from deserting it when abroad, from leaving it unmanned, and in times of danger, arising either from perils of the sea, or the attacks of an enemy, will be more anxious for its preservation. But these good effects would be entirely defeated, if insurance

8 Geo. I.
ch 24. s. 7.

on their wages were to be permitted ; for to whatever cause the loss might be attributed, they would still be secure. Since the former editions of this work, it has been held in an express case upon the subject, that a sailor can neither insure his wages, nor any commodity, which he is to receive at the end of the voyage in lieu of wages. However, it should seem, that this regulation does not mean to prevent mariners from insuring for the homeward voyage those wages which they have received abroad, or goods which they have purchased with those wages in order to bring them home ; but, in such a case, they are considered in the same light with other men.

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I.

Webster v.
De Taffet,
7 Term
R. 157.

1 Magens,
19.

These prohibitions do not extend to the masters of ships ; and therefore it has been held that an insurance on the commission, privileges, &c. of the captain of a ship in the African trade is legal.

King v.
Glover,
2 New
Rep. 206.

In an action upon a policy of insurance upon *Fort Marlborough*, otherwise *Bencoolen*, in the *East Indies*, for twelve calendar months, from the first of *October* 1759, to the first of *October* 1760, against an *European* enemy, for the benefit of the governor, it was doubted by the learned chief justice who tried that cause, whether a policy against the loss of *Fort Marlborough* for the benefit of the governor was good, upon the principle which does not allow a sailor to insure his wages. But afterwards, when he came to deliver the opinion of the court upon all the points in that cause, after mentioning this doubt, which occurred to his mind, he went on thus : " But considering that this place, though called a fort, was really but a factory or settlement for trade ; and that he, though called a governor, was really but a merchant ; considering too, that the law allows a captain of a ship to insure goods which he has on board, or his share in the ship, if he be a part owner ; and the captain of a privateer, if he be a part owner, to insure his share ; considering too, that the objection could not, upon any ground of justice, be made by the insurer, who knew him to be the governor at the time he took the premium ; and as with regard to principles of public convenience, the case so seldom happens, (I never knew one before,) any danger from the example is little to be apprehended ; I did not think myself warranted, upon that point,

Carter v.
Boehm,
3 Bur.
1905. and
1 Blackst.
593.

Lord
Mansfield.

C H A P. I. " to nonsuit the plaintiff: especially too, as the objection did
 " not come from the bar. Though this point was mentioned,
 " it was not insisted upon at the last trial; nor has it been
 " seriously argued, upon this motion, as sufficient alone to vacate
 " the policy: and if it had, we are all of opinion, that we are
 " not warranted to say that it is void upon that account."

Ord. of
 Stockholm.
 Bynker-
 shoek's
 Quest.
 Juris pub.
 lib. 1. c. 21.
 p. 153.

It has long been a question, how far insurances upon ships or goods of enemies be politick or legal. Upon the continent of *Europe* it should seem, that they are in general absolutely prohibited, under penalty of the insurance being void, and the delinquent's forfeiting the sum, to which he had subscribed. These laws have been passed from an idea, that such insurances are prejudicial to the interests of the country tolerating such contracts, by enabling an enemy to continue his trade, on account of the degree of protection thus afforded him against the maritime strength of the nation making the insurance. In *England*, till very lately, this question has been undecided; but the court of King's Bench have, in some very modern instances, been unanimously of opinion that such insurances are illegal and absolutely void. I shall, however, when I come to the chapter on illegal voyages, state the arguments on both sides of this important question. In this place I shall only observe, that in the year 1748, a bill was introduced into parliament, " to prevent
 " assurances on ships belonging to *France*, and on merchandizes
 " and effects laden thereon, during the then existing war with
 " *France*." That bill was opposed on principles of policy and expediency, by the two greatest lawyers and most eminent speakers of that age, the Honourable *William Murray* and Sir *Dudley Ryder*; but the legislature thought proper to pass the bill into a law, inflicting a penalty of 500*l.* upon the persons making such insurances, and also declaring the policy to be void.

Brandon v.
 Nesbitt, and
 Britton v.
 Towers,
 6 T. R. 23.
 & 35.
 Potts v.
 Bell, 8 T.
 R. 548.

Deb. in
 House of
 Com. by
 Debrett,
 vol. ii. p.
 171.

21 Geo. II.
 c. 4.

23 Geo. III.
 c. 27. s. 4.

The existence of that act, however, was limited by the duration of the then war. But in the year 1793 a similar legislative provision has been made, declaring that insurances in the act mentioned shall not only be void, but the offending person shall be imprisoned three months. This statute is also temporary; but the decisions above alluded to, and which will be fully quoted hereafter, have determined that all insurances upon the property of an open enemy are void, independant of the acts
 of

of parliament. It is not to be dissembled that these decisions are rather in opposition to the sentiments of Lord *Mansfield* and Lord *Hardwicke*: for although the case does not seem ever to have come for a judicial opinion before them, yet it is evident, from what they have declared both in parliament and on the bench, that on principles of expediency, those illustrious men were inclined to support such insurances, although it should seem, with all deference to such names, that even the expediency of the measure may greatly be doubted.

C H A P.
I.

1 Ves. 340.
Gift v.
Mason,
Sittings at
Guildhall,
Mich. Vae.
1785.

One species of insurance on foreign ships or goods was formerly prohibited by statute, with a view to secure to the *East India* Company the sole trade to and from the *East Indies*, and other places, beyond the *Cape of Good Hope*. The statute, after reciting, that to admit of insurances on the ships or vessels of foreigners trading to the *East Indies*, may be a means of encouraging his Majesty's subjects to share with foreigners, in establishing new societies or companies for carrying on the said trade in the dominions of foreign states or princes, enacts, "That no insurances shall be made, or money lent on bottomree, on foreign ships or goods, bound to or from the *East Indies*, under the forfeiture of treble the sum insured or lent." It contains an exception, however, in favour of insurances made, or to be made, on ships of the subjects of such sovereigns, as carried on a trade with that part of the world, previous to the month of *October* 1748. This act was to be in force for seven years. Whether upon a trial it was found to be a politick or wise regulation, I have not been able to discover: but the presumption is to the contrary; as it does not appear from the statute book, that this act of parliament was continued, or that it was revived by any subsequent statute.

25 Geo. II.
c. 26.

3dly, Of the requisites of a policy. The form of a policy, now used in *London*, is nearly the same which was adopted two hundred years ago, as may be collected from *Malyne*; but its antiquity cannot preserve it from just censure, it being very irregular and confused, and frequently ambiguous, from making use of the same words in different senses.

Malyne,
103.
3 Burr.
155.

The essentials in the contract of insurance are; First, the name of the person for whom the insurance is made: Secondly, the

the

C H A P. I the names of the ship and master : Thirdly, whether they are ships, goods, or merchandizes, upon which the insurance is made ; Fourthly, the name of the place where the goods are laden, and whither they are bound : Fifthly, the time when the risk begins, and when it ends : Sixthly, all the various perils and risks which the insurer takes upon himself : Seventhly, the consideration or premium, paid for the risk or hazard run : Eighthly, the month, day, and year, on which the policy is executed : Ninthly, the stamps required by act of parliament. Of each of these in their order.

First, Of the name of the person insured. It was formerly very much the practice to effect policies of insurance, in *blank* as it was called, that is, without specifying the names of the persons, for whose use and benefit, or on whose account such insurances were made ; a practice which had been found in many respects to be mischievous, and productive of great inconveniences. This mischief was remedied at a very early period in *Genoa* and *France* by the marine ordinances of those countries, which required the name of the person insured to be inserted in the policy, and whether he was to be considered in the capacity of principal or factor. In *England* a similar regulation took place in the year 1774, with respect to insurances upon lives ; but it was not till the year 1785, that any provision was made upon the subject as to policies upon ships and merchandizes, the statute of the 14th *Geo.* 3. having in terms exempted marine insurances from its operation.

25 *Geo.* III.
c. 44.

The statute declares, “ That, from and after the fifth day of
“ *July* 1785, it shall not be lawful for any person or persons,
“ who reside in *Great Britain*, to make, or cause to be made,
“ any policy or policies of insurance upon his, her, or their in-
“ terest in any ship or ships, or any goods, merchandizes, effects
“ or other property, without inserting in such policy or policies,
“ *his, her, or their own name or names*, as the person interested
“ therein, or the *name or names of the person or persons*, who shall
“ effect the same, as the *agent or agents* of the person or persons
“ so really interested therein, or for whose use or benefit, or on
“ whose account, such policy or policies is or are underwrote :
“ and that it shall not be lawful for any person or persons, who

See Cox and
another,
Executors,
v. Parry,
1 Term
Rep. 464.
In which it
was held
that the
Executors
could not
recover, be-
cause amongst other grounds, the name of their Testator was not inserted in the policy.

shall

“ shall not live or reside in *Great Britain*, to make, or cause to be made, any policy or policies of assurance upon his, her, or their interest in any ship or ships, or on any goods, merchandizes, effects, or other property, without inserting in such policy or policies the name or names of the agent or agents of the person or persons so really interested therein, and for whose use or benefit, or on whose account, the same is or are so made and underwrote: and that every policy or policies of assurance, made or underwrote contrary to the true intent and meaning hereof, shall be null and void to all intents and purposes.”

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I.

Upon the statute just recited, a question of some consequence very soon arose, namely, Whether, when the agent effects a policy for the principal residing abroad, it be necessary to insert his name in the policy, *as agent*. Upon a debate, it was held, that if it be not stated, that he effected the policy, *as the agent* of the principal, the policy will be void within the statute. Another question also occurred in the same cause, Whether it was not the intention of the legislature, when the principal resided abroad, that the agent should live in *England*. It did not become necessary for the court to decide the latter question; but the leaning of the judges clearly was in the affirmative.

Pray and
others v.
Edie, 1
Term. Rep.
p. 313.

If there were more persons interested than one, it was absolutely necessary under the above statute that the names of all should be inserted, otherwise the policy was void. Nor would any other description answer the design of that statute. Thus in a case, where there were several plaintiffs, the policy was made “ *In the name of Mr. William Wilton and the rest of the owners,*” Mr. Justice Buller held the policy was void under the statute.

Wilton and
others, v.
Reatton,
B. R. at
Guildhall
1787.

Sittings after Mich.

The decisions which have been made upon this statute have now become very immaterial; and are only referred to in order to shew the complete history of that branch of the law, which we are discussing: for such mischiefs and inconveniences were found to arise to persons interested in ships or vessels from that act of parliament, that, by a subsequent statute, it was wholly repealed. But it was not deemed expedient again to allow of policies in blank; and therefore the same statute declared,

28 Geo. III.
ch. 56.

Q H A P. I. " That it should not be lawful, from and after the passing of that act, for any person or persons, to make or effect, or cause to be made or effected, any policy of assurance on any ship or vessel, or upon any goods, merchandizes, effects, or other property whatsoever, without first inserting, or causing to be inserted in such policy, the name or names, or the usual stile and firm of dealing of one or more of the persons interested in such assurance; or without, instead thereof, first inserting the name or names of the usual stile and firm of dealing of the consignor or consignors, consignee or consignees, of the goods or property so to be insured; or the name or names, or the usual stile and firm of dealing of the person or persons residing in *Great Britain*, who shall receive the order for and effect such policy, or of the person or persons who shall give the order or directions to the agent or agents immediately employed to negotiate or effect such policy." The statute further declares " that every policy made or underwrote contrary to the true intent and meaning of this act, shall be null and void to all intents and purposes."

De Vignier
v. Swanston,
P. R. Mich.
39 Geo. III.
Bell v.
Gilson,
Bosanquet
and Puller's
Rep. 1st Vol.
345.

Upon this act it has been held, that it is not necessary where a policy is effected by an agent, to add the word *agent* or any other description to his name, in the policy itself. And it has also been decided, that a policy effected by a broker, describing himself therein as *agent*, has sufficiently complied with the requisition of the statute.

French v.
Backhouse,
5 Burr.
2727.

Previous to the passing of either of these acts it was held, that the husband of a ship had no right to insure for any part-owner, without his particular direction: nor for all the owners in general, without their general direction, or something equivalent to it.

Secondly, of the names of the ship and master. I do not find any express regulation of this matter in *England*; but it seems to be necessary, by the law and usage of merchants, to insert the names of the ship and master, in order to fix with precision the bottom upon which the adventure is to be made, and the captain, by whose direction the ship is to be navigated, because, according to the degree of strength and sufficiency of the one, and the skill, ability, and knowledge of the other, the risk is increased

or

or diminished; and so also probably will the amount of the premium be regulated. The usage of the merchants of *England* in this respect is agreeable to the express laws and regulations of other maritime states upon this point. Sometimes, however, there are insurances generally "*upon any ship or ships*" expected from a particular place: and although it is more accurate to insert the name of the captain, I would not be understood to assert, as no decision has been made, that if a different captain came in the ship from that whose name is mentioned in the policy, it would therefore be void; especially as the policy always contains the words "or whosoever else shall go for master in the said ship."

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I.

Ord. of
Lew. 14.
tit. Insu-
rance, art. 3.
Ord. of
Amsterdam,
f. 2.

Neither would the insurance be vitiated if the name of the ship was mistaken, provided the identity was proved, and that there was no fraud, for as the policies contained in the printed form, "or by whatsoever name the ship should be called," those words are not confined to the case of a ship having another name than that mentioned in the policy. The case in which this point lately arose was in an insurance on goods described by the policy to be on board *the American ship President*; the real name being *The President*; but the broker, having been directed to insure the ship *President*, and to designate her *an American ship*, had by mistake described her as above. The Court were of opinion, that the whole was to be taken as her name, and not as a warranty of her being "*an American ship*" called *The President*. And it was also holden to be no variance, that the real name of the ship was *The President*, the identity of the ship meant to be insured with that name being proved; and no fraud being imputed to the transaction. And in delivering his opinion, Mr. Justice *Lawrence* read a note of a case decided by Lord Chief Justice *Lee*, at *Guildhall*, exactly in point. The insurance there was made on "*The Leopard, or by whatsoever other name, &c.*" whereof was master, for that voyage, *A. B.*, or whosoever else should be master." Upon the evidence of *A. B.* it appeared, that this ship was called *The Leonard*, and was never called *The Leopard*. But the Lord Chief Justice was of opinion, that it was only necessary to prove the identity, which was done by Captain *A. B.*

Le Mesurier
v. Vaughan,
6 East, 381.

Hall v.
Molyneux,
Dec. 1744.
at *Guildhall*,
6 East, 185.
MSS. Cases
penes me.

C H A P.

I.

Kewley and
another v.
Ryan, 2 H.
Blackst.
Rep. p. 343.
See this
case again
quoted for
another
point, post,
c. 17.

Since the publication of the two first editions of this work, the validity of insurances upon *ship or ships* was very elaborately discussed in the court of Common Pleas, and the judgment of the court, consisting of Lord Chief Justice *Eyre*, Mr. Justice *Baller*, Mr. Justice *Heath*, and Mr. Justice *Rooke*, was unanimous in their favour; and that the assured had a right to cover by such policy whatever ship he thought proper, that fell within the terms of it. The facts of the case were these—On the 24th *May* 1793, *Freeland* and *Rigby*, merchants at *Saint Vincens's*, wrote to the plaintiffs, merchants at *Liverpool*, who were also partners in a house of the same name at *Grenada*, requesting them to get 1,260*l.* insured on 70 bales of cotton shipped on board the *Elizabeth*, from *Grenada* to *England*, and also 1,300*l.* on another cargo of cotton and other goods, which they intended to ship on board *some other ship* that should sail with the first convoy, and therefore directed the latter insurance to be on *ship or ships*. The plaintiffs accordingly, by their broker, insured 1,260*l.* on board the *Elizabeth* in *London*, and 1,300*l.* on board *ship or ships*, viz. 700*l.* at *Liverpool* and 600*l.* in *London*. The policy for 700*l.* of which the defendant underwrote 50*l.* and on which the action was brought, was *at and from Grenada to Liverpool*, on any kind of goods as interest should appear, in *ship or ships on account of Freeland and Rigby*, warranted to sail on or before the 1st of *August* 1793, and to return 3 *per cent.* if the ship sailed with convoy bound to *Great Britain*, and arrived, &c. without any exception of the goods on board the *Elizabeth*. The policy for 600*l.* effected in *London*, was also on *ship or ships*, at and from *Grenada to Liverpool*, but with an exception of 1,260*l.* “on 70 bales of cotton *per Elizabeth, Crettin*,” the same underwriters in *London* having before subscribed the policy on the *Elizabeth*. But the plaintiffs did not communicate to the underwriters at *Liverpool* the letter of *Freeland* and *Rigby*, directing an insurance on the *Elizabeth*, nor any circumstance respecting the goods shipped on board the *Elizabeth*, and the insurance made on that ship. The *Elizabeth* sailed early in *June*, and arrived safe at *Liverpool* in *August* 1793. The *Heart of Oak*, on board of which *Freeland* and *Rigby* had shipped their second cargo of cotton, &c. failed the latter end of *July*, bound for *Liverpool*, but with a design formed before the commencement of the voyage, (as appeared by clearances, and was admitted on all sides,) to touch at *Cork* in
her

her way to *Liverpool*, but was totally lost before she arrived at the dividing point. The defendant pleaded the general issue, and a tender of 1*l.* 10*s.* on account of the safe arrival of the *Elizabeth*, which plaintiff took out of court, and obtained a verdict for 48*l.* 10*s.*

C H A P.
I,

A rule having been obtained to shew cause, why there should not be a new trial on several grounds, the court discharged the rule, declaring as to this point, that the legality of the policy on *ship or ships* was too well established, both by usage and authority, to be disputed: As to the second, that the assured had clearly a right to apply such an insurance to whatever ship he thought proper, within the terms of it; for which the case of *Henchman v. Offley*, was an authority.

B. R.
Michael.
23 Geo. III.
See that case
fully reported.
2. H.
Black. Rep.
345. Note
(a).

It has also been held, that the owners of goods insured by the act of shifting the goods from one ship to another, do not preclude themselves from recovering an average loss arising from the capture of the second ship, if they acted from necessity, and for the benefit of all concerned.

Plantamour
v. Staples,
1 Term
R. 611.
note (a)
upon a case
reserved,

Thirdly, whether they are ships, goods or merchandizes, upon which the insurance is made, is a fact which must be stated. It is absolutely necessary that there should be a specification upon which of these the underwriter insures; because otherwise it would be impossible to know, whether, in any instance, he is liable or not to the loss sustained. But it is another question, whether, in policies upon goods, it be necessary to declare the particulars. The practice, I believe, is very unsettled. It is the opinion, however, of a very respectable merchant, that the particulars of goods should be specified, if possible, by their marks, numbers, and packages, rather than that they should be included under the general denomination of merchandize; or that if it be agreed to insert them, when known to the insured, care should be taken not to omit it, as such specification prevents much trouble in proving to the insurer the particular goods insured, which are more or less subject to damage. But this mode of particularizing property is only adviseable to be done, or, indeed, can only be done, when the risk commences at home; because, when goods are coming from abroad, it is better to insure under general expressions, on account of the various casualties,

1 Magens,
8.

C H A P. ^{I.} which may happen to obstruct the purchase of the commodities intended to be sent. It may be proper here to mention, that there are certain kinds of merchandize, which are of a perishable nature, and liable to early corruption; on account of which, the underwriters of *London* have inserted a memorandum at the foot of their policy, by which they declare, that in insurances upon corn, fish, salt, fruit, flour, and seed, they will not be answerable for any partial loss, but only for general averages, unless the ship be stranded. That in insurances on sugar, tobacco, hemp, flax, hides, and skins, they consider themselves free from partial losses, not amounting to *five per cent.* and that on all other goods, as well as on the ship and freight, if the partial loss be under *three pounds per cent.* unless it arise from a general average, or the stranding of the ship, they also consider themselves discharged.

Vide the
Append.
No. 1.

Per Buller
Justice in
Cocking
v. Frazer,
B. R. East,
25 Geo. III.
vide post.

Cantillon v.
Lond. Assur.
Comp. men-
tioned
3 Burr.
7553.

This clause was introduced in the year 1749, in order to prevent the underwriters from being harassed by trifling demands, which must necessarily have arisen upon every insurance of this kind, on account of the perishable nature of the cargo. The form of this memorandum was universally used, as well by the two insurance companies, as by private underwriters, till the year 1754, when Lord Chief Justice *Ryder* ruled, and a special jury, agreeably to his direction, decided, that a ship, having run a-ground, was a stranded ship within the meaning of the memorandum; and that although she got off again, the underwriter was liable to an *average or partial loss* upon damaged corn. This decision induced the two companies to alter the memorandum, by striking out the words, "*or the ship be stranded;*" so that now they consider themselves liable to no losses, which can happen to such commodities, except general averages and total losses: But the old form is still retained by the private insurers.

What shall be considered as losses within the meaning of this memorandum, will be the subject of future investigation; my design at present being only to enumerate the essentials of a policy, and the reason and origin of them, as far as I have been able to trace them.

There are, however, some kinds of property, which do not fall under the general denomination of goods in a policy; and
for

for the loss of which the underwriters are not answerable, unless they are specifically named.

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An action was brought upon a policy of insurance of the captain's goods for six months certain. The loss proved was chiefly for goods lashed on deck, and the captain's cloaths, and the ship's provisions. It was proved by an underwriter and a broker, that none of those things are within a general policy on goods; for the risk was greater as to goods lashed on deck than other goods: and a policy on goods means only such goods as are merchantable, and a part of the cargo. They also swore, that when goods like the present are meant to be insured, they are always insured by name; and the premium is greater.

Ross v.
Thwaites,
Sit. after
Hil. 16.
Geo. III.
at Guildh.

Lord Mansfield said, he thought it consistent with reason, and understood the usage to be so: therefore he advised the plaintiff to withdraw a juror, the premium having been paid into court, to which he consented.

And in a more modern case Mr. Justice Chambre and a special jury decided, that goods stowed on deck were not within a general policy on goods.

Backhouse v.
Ripley, Sit.
after Mich.
1802, 19
C. P.

It is a question whether a cargo of dollars, or other coin, jewels, &c. if lost, be recoverable under a policy upon goods and merchandizes generally: and I can find no printed case, where the question has been at all discussed in *England*. In one case, *Da Costa v. Firth*, the subject matter of the insurance was bullion, and the policy was general on goods and merchandizes; but no objection was taken on that ground, nor was the point ever argued. By the ordinances of several foreign states, *Middleburg*, *Amsterdam*, *Konigsburg*, and others, it is specially declared, that money shall not be recovered under the denomination of goods or merchandize; but the insurance must, in the policy, be expressed to be upon money to render it valid. The book, in which the ordinances above referred to are collected, states explicitly that gold and silver, coined and uncoined, pearls, and other jewels, may be insured at *London* and *Hamburg*, and several other places, under the general expression of merchandize.

4 Burr.
1966.

2 Magens,
71, 89,
131, 187.

1 Magens,
10.

Recess,

C H A P.

I.

See post

p. 127, 129.

Roccus,

Not. 17.

Roccus, in his treatise upon insurances, concurs in the latter opinion, and quotes *Santerna* upon the subject; he draws a distinction, upon the merits of which I do not presume to decide, between money or jewels, for the purposes of commerce, which constitute part of the cargo, and such as are merely personal, and for private purposes; the former being clearly liable to contribute to a general average, but not the latter. His words are these: "*Affecurans merces in talem navem immiffas, intelligitur affecurare pecuniam, aurum, argentum, gemmas, margaritas, et annulos in dicta navi existentes, qua omnia, appellatione mercium, in navem immiffarum, comprehenduntur, licet expreffa non fuiffent. Santerna declarat, quod fi pecunie, margarite et annuli erant deftinati ad vendendum vel mercandum alias merces, tunc appellatione mercium veniunt, et in affecuratione comprehenduntur; et loco mercium habentur: vocat dictas res merces, cum occasione earum, habeat locum contributio, ficut aliarum rerum, ne in iftis affecurationibus mercatorum potius apices juris, quam veritas obfervari videantur: et tandem, quia large comprehenduntur omnes res, qua funt deftinata ad negotiandum, et facit etiam, quod confecratio mercium navis extenditur etiam ad pecuniam numeratam.*"

I forbear to draw any conclusion from these premises, which is the plan I have uniformly adopted, where there is no adjudged case upon the question.

Fourthly, The name of the place at which the goods are laden, and to which they are bound.

This has been always held to be necessary in policies, at least for upwards of two hundred years; and must be so, on account of the evident uncertainty which would follow from a contrary practice, as the insurer would never know what the risk was, which he had undertaken to insure.

Molloy, b.
2. c. 7.
f. 14.

Molloy has laid down this doctrine, that if a ship be insured from *London* to _____, a blank being left by the lader of the goods to prevent a surprisè by an enemy, and if in her voyage she happen to be cast away, though there be private instructions for her port, yet the insured must sit down with his loss, by reason of the uncertainty. In support of his opinion, he cites the case of *Monfieur Gourdan*, governor of *Calais*, which was decided by commissioners of assurance at *Rouen*.

Rouen against the assured, because, although the bills of lading truly declared the quantity and quality of the goods, the port of the ship's discharge was left a blank, on account of the war, which was then existing. Such also is now the law and usage of merchants.

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It is also customary to state in the policy at what port or places the ship may touch and stay during the voyage, so that it shall not be considered as a deviation to go to any of those places.

Fifthly, The time when the risk commences, and when it ends. In most of the commercial countries abroad, it is particularly expressed, either in their ordinances or policies, and sometimes in both, that the risk of the insurers shall commence the moment the goods quit the shore, and shall continue till they are landed at the place of their destination: and that the insurer not only runs the risk in the ship named in the policy, but also in all the boats or lighters, that shall be employed in carrying the goods aboard, and also in fetching them ashore. But the custom of this country is very different, for the *English* policies expressly declare, that "the adventure shall begin upon the said goods and "merchandizes from the loading thereof on-board the said ship, "and so shall continue until the said ship, goods, and mer- "chandizes shall be arrived at L, and upon the said ship until "she hath moored at anchor 24 hours in good safety; and upon "the goods till the same be there safely discharged and landed." From these words, it is obvious, that insurers are not answerable for any accidents, which may happen to the goods in lighters or boats going aboard, previous to the voyage; yet as the policy says, the risk shall continue till the goods are safely landed, it seems no less obvious, that where ships cannot come close to the quay in order to unload, the insurer continues responsible for the risk to be run in carrying the goods in boats to the shore. If there be a loss, however, in these cases, the accident must have happened while the goods were in the boats or lighters belonging to the ship; for then it is considered as a continuance of the same ship and voyage. But in a case where the owner of the goods brought down his own lighter, received the goods out of the ship, and before they reached land, an accident happened, whereby the goods were damaged, a special jury of merchants,

Ord. of
Antwerp,
Amsterdam,
France,
Spain, and
Copen-
hagen.

Vide Ap-
pendix,
No. 1.
As to con-
tinuance of
the risk
upon the
ship, see
c. 2.

Sparrow v.
Caruthers,
2 Stra.
1236.

under

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I.

under the express direction of Lord Chief Justice *Lee*, found that the insurer was discharged, although the insurance was upon goods to *London*, and till the same shall be safely landed there.

Hurry and
others vers.
The Royal
Exch.
Assurance,
a Bof. and
Pall. 430.

In a late case in the Court of Common Pleas, that of *Sparrow v. Carruthers*, appeared to be considerably shaken *. The policy was in the usual form, "from *Petersburg* to *London*, on goods "till they should be there discharged and safely landed." The cause was tried before Lord *Eldon*, Chief Justice, when it appeared that the ship and goods arrived in safety in the river *Thames*. That the plaintiffs being the consignees of the goods by their broker, employed and paid a lighterman belonging to one of the public lighters, entered at *Waterman's Hall* to land the cargo, which was damaged on board the lighter, but without any negligence imputable to the lighterman; that it is the constant practice for merchants in the *Russian* trade to land their goods by means of lighters; and that there are no other lighters now in use among the merchants but the public lighters. A verdict was given for the plaintiffs, with liberty to the defendants to move for leave to enter a nonsuit, upon the ground that the insurers were discharged by the delivery of the cargo to the lighters employed and paid for by the plaintiffs.

The case was argued, and the three learned judges of that court (*Heath*, *Roche*, and *Chambre*, Justices) were of opinion, that the insurers were not discharged. In giving their opinions they relied upon the words of the policy and the usage of trade,

* In a still later case, *Strong v. Nataly*, 1 New Rep. 16, Mr. Justice *Roche*, one of the learned Judges, who decided that of *Hurry v. The Royal Exchange* company, denied that the Court intended to shake the authority of *Sparrow v. Carruthers*; but to decide it upon its own circumstances, and the case of *Strong v. Nataly* was decided upon the authority of *Sparrow v. Carruthers*, as not distinguishable from it. In this latter case, on the arrival of the goods insured, they were put on board a lighter hired in the usual way, and brought to a wharf belonging to the plaintiff in the afternoon, but in consequence of the roughness of the weather could not be landed that evening. The lighterman finding he could not land the goods, asked the plaintiff whether he (the lighterman) should stay to see the cargo landed. The plaintiff said he need not do so, for that he would see to the landing himself. Accordingly the lighterman left the cargo alongside the wharf. In the course of the night, the lighter was sunk by unavoidable accident, and the goods were lost.

The Court held that the underwriters were discharged, the plaintiff having taken the goods into his own possession before they were landed, having the complete control over them, and renounced all benefit under the policy.

OF THE POLICY.

29

it being impossible for large vessels to come up to the wharfs to deliver their goods, and these lighters are *public* lighters, publicly registered, and equally known both to the underwriters and owners of the goods. All the judges expressly said, they did not wish to interfere with the case of *Sparrow v. Carruthers*, but they relied upon the distinction between public and private lighters, a distinction which, it seems, had been previously taken at *Nisb Prius*, in a case of *Rucker v. The London Assurance Company*, by the late very learned Mr. Justice Buller, and which distinction had never been questioned by any appeal to the court against that Judge's opinion.

C H A P.
I.

See this case
in 2 Bos.
and Pull.
432. note
(a).

Lord Eldon, having been promoted to the office of Lord High Chancellor, was not present when this case was decided; but having been counsel in the cause at the trial, I ought to state that his Lordship at that time appeared to me to entertain the same sentiments with those of the learned Judges who ultimately decided it *.

By the ordinances last referred to, the number of days, in which people are obliged to unload their goods, is stipulated; but in *England* no express time is fixed, the owners being left to their own discretion, provided there is no unreasonable delay, which must always depend upon circumstances.

See post,
ch. 2.
Noble v.
Kenway.

The risk on the body of a ship, according to the form of the policy received in practice, is to commence in general
“ at and from _____ and so shall continue and
“ endure until the said ship shall arrive at
“ and hath there been moored at anchor twenty-four hours in
“ good safety.”

1 *Magna*,
47.

When insurance is made indeed on the homeward risk, the beginning of the adventure is sometimes stated to be “ imme-

* In an insurance on goods on board a Spanish ship from *Nassau* to *Campeachy* and back, till discharged and safely landed, and the ship having a licence from the British government at *Nassau*, and having sailed to *Campeachy*, and having arrived off that port made signals for launches to come out, into which the goods were put for the purpose of being run a shore. The Court thought the goods were protected by the policy while on board the launches, such being the usual method of carrying on that trade. *Matthis v. Patt*, 3 Bos. and Pull. 23.

C H A P. I. "diately from and after her arrival at the port abroad;" at other times, "from the departure;" and in short, it is so variable, that nothing certain can be said upon the point, depending, as it always has, and always must, upon the inclinations of the insured, as expressed in the contract.

Book 2.
c. 7. f. 7.

See the
Appendix.

1 Magens,
50.

Malyne,
c. 25. Lex
Merc. Red.
4th edit.
p. 295

7 Geo. II.
c. 15.

Sixthly, Of the various perils and risks, against which the underwriter insures. These must always be inserted in all policies, and indeed the words now used are so comprehensive, that in the opinion of *Molloy*, all those curious questions, which occasioned much debate and controversy among the lawyers of former days, are now finally settled. Be this as it may, it is certain, that there is hardly any event which the imagination can form, as likely, in the common course of things, to happen to any ship, that is not amply provided for by the policies now used by underwriters. They undertake to bear "all perils of the sea, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart, and counter mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever; barratry of the master and mariners, and all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes, and ship, or any part thereof." But although the words, descriptive of the hazards run by the insurers, be so very large and comprehensive, it should seem that a great difference is to be made between the damage sustained by goods from injuries *on board* a ship, and that which occurs by external accidents; that the insurer is liable in the latter case cannot admit of a doubt, but as the former may proceed from the bad stowage of the goods, or from their being exposed to wet; and as they are neglected attributable to the master; the ship, and not the insurer, ought to be answerable. Upon this point, however, I find no case in the reports, and therefore I merely state what I conceive to be understood as the law upon the subject. In *Malyne* it is said, that if there be thieves on ship-board among themselves, the master of the ship is to answer for that, and to make it good, so that the insurers are not to be charged with any such loss, for he supposes the word "thieves" to mean *assailing thieves* only, for so he terms them. It is certain, that a modern statute gives some countenance to this idea, by the preamble to which it appears,

pears, that previous to the period of passing that act, the owners of the ship were liable to the proprietors of the goods for any embezzlement, secreting or making away with, of the goods, by the master or the mariners, or with their privity, to whatever amount the value might be : by that statute, however, the measure of the responsibility is to be the value of the ship and freight (a). To be sure, it is not a necessary consequence, that because the owner is liable in such a case, therefore the insurer, if an insurance has been made, must be discharged, especially as the underwriter expressly undertakes, by the terms of the policy, to answer for the barratry of the master and mariners. *Roccus*, however, is of opinion, that when a theft is committed on board the ship, and some goods have been stolen, then the insurers are not bound, because the owners of the goods, as much as in him lies, is obliged to take care of them ; and if they are stolen, while in the vessel, this cannot be called an *accident*, but has happened through the *negligence* of those, who did not take proper care of them. He adds, that the master or owners being liable, is an additional reason for this regulation, because the master of the ship is held answerable for thefts committed therein, as by receiving the goods on board, he enters into a tacit agreement to deliver them safe and whole. It was thought proper thus to state the opinion of this learned writer upon the subject, the law of *England* in this respect being silent ; though his reasoning upon this subject is by no means conclusive as to *English* insurances, on account of the express terms of the contract.

*Roccus de
affecura-
tionibus,
Not. 42.*

But that the underwriter is liable for a robbery of the goods insured, when committed by thieves from without, cannot be doubted ; as thieves are a peril expressly insured by the policy.

*Harford v.
Maynard,
b. f. Lord
Mansfield
at Guild-
hall, Hil.
Vac. 1785.
Molloy,
b. 2. c. 7.
s. 5.*

In addition to the various risks above enumerated, which the underwriters take upon themselves, it is the general practice, to insure *lost or not lost*, which is certainly very hazardous ; because if the ship or goods should be lost at the time of the insurance, still the underwriter, provided there be no fraud, is liable. The

(a) By a subsequent statute, 26 Geo. III. ch. 86. the owner's responsibility is limited to the value of the ship and freight, even in cases of *external* robbery, without the privity of the masters or mariners ; and by the 2d section, owners are wholly exempted from any loss occasioned by fire.

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Roccus,
No. 51.
5 Barr.
2803.

premium is, however, in proportion, depending upon the circumstances stated to shew the probability or improbability of the ship's safety. These words "*lost or not lost*," are peculiar to *English* policies, not being inserted in the policies of foreign nations.

34 Geo. III.
c. 80. s. 10.
continued
by 39
Geo. III.
c. 80. s. 24,
25.

There is one case, in which, by act of Parliament, the underwriters are prevented from paying upon certain of the risks mentioned in the printed policies, and that is in insurances upon cargoes of slaves. The acts of parliament upon this subject are annual acts, for regulating the shipping, and carrying slaves in *British* vessels from the coast of *Africa*: but they have now been continued for several years, and on account of the benefits derived to the slaves from the humanity of those provisions, are likely to be continued (a). With a view, therefore, to procure better treatment, when in health, and a greater degree of care and attention when in sickness, for the objects of this traffic, the legislature has provided, that though the usual printed words may remain on the face of the policy, that no loss or damage shall hereafter be recoverable on account of the *mortality* of slaves *by natural death or ill treatment*, or loss *by throwing overboard* of slaves on any account whatever, or loss or damage by restraints and detainments, by kings, princes, people or inhabitants of *Africa*, where it shall be made appear that such loss or damage has been occasioned through any aggression for the purpose of procuring slaves, and committed by the master of any such ship or by any person or persons commanding any boat or boats, or party or parties of men belonging to any such ship, or by any person or persons acting by the direction of any such master or commander respectively.

(a) When the insurances made upon slaves prior to *May* 1807, shall have expired, no question of law can ever arise on that subject again; for by an act passed 47 G. 3. ch. 36 the African slave trade is utterly abolished, from the 1st of *May* 1807, and the 5th s. of the act prohibits all insurances respecting slaves, declaring them unlawful, under a penalty of 100*l.* and three times the amount of the premium. But the 6th s. declares that no insurance shall be void made upon this subject, provided the vessel shall have been cleared out from *Great Britain* before the 1st of *May* 1807, and the slaves be finally landed in the *West Indies* before the 1st of *March* 1808, unless prevented by capture, the loss of the vessel, the appearance of an enemy on the coast, or other unavoidable necessity, the proof whereof to lie on the party charged.

Seventhly,

Seventhly, The consideration or premium for the risk or hazard run: this is the most material part of the policy, because it is the consideration of the premium received, that makes the underwriter liable to the losses that may happen. In *English* policies it is always expressed to have been received at the time of underwriting; "we the assurers confessing ourselves paid the consideration due unto us for this assurance by the assured." This being subscribed by the underwriter, it is proper to enquire whether, if the premium were not actually paid at the time, he could afterwards maintain an action for it against the *assured*, who might then produce his subscription, as evidence against himself. One old case has been found upon the subject, but that is by no means satisfactory. It was an action of *assumpsit*, and the plaintiff declared that the defendant was indebted to him in twenty pounds, for a premium upon a policy of insurance on such a ship. The defendant demurred *specially*, because the plaintiff did not shew the consideration certainly, what the premium was, or how it became due: but the objection was not allowed, for this is as good as an *indebitatus pro quodam salario*, which has been adjudged good. Here, however, is no decision upon the merits, nor does it appear, whether the defendant was the broker or the insured himself. It is true, in practice, policies in general are effected by the intervention of a broker; and by the usage of trade, open accounts are kept between the insurers and brokers, in which case, the underwriter may have an action against the broker for premiums received to his use. In one case, indeed, the question did arise, though nothing was done upon it.

Fowk v. Pinfacke,
2 Lev. 153.

It was an action by the insurer against the owners, who in this case acted, without the intervention of a broker, for money had and received to his use. The case was decided upon other grounds, for which it will be mentioned more at length hereafter; but just before the verdict was given, it was objected, that this action would not lie for premiums against the *insured themselves*. Lord *Mansfield*, however, thought the objection came too late, and would not, at that stage of the cause, when the jury were ready to give their verdict, enter into it.

Gib v. Moffon, Mich.
Vac. 1785.
at Guildh.

In an action brought by the assignees of a broker against the assured, for premiums paid by the bankrupt to the underwriters,
G the

C H A P. I. the question came collaterally before the court : but I do not find that any point was reserved, and the verdict was general. However, upon all the cases it seems that the broker alone is the debtor to the underwriter.

Airy and others,
Assignees of
Milton v.
Bland, Trin.
Sitt. at
Guildhall,
24 Geo. III.

It was an action brought by the plaintiffs, as assignees of *Milton*, who was a broker at *Newcastle*, and who had procured an insurance to be effected by different persons for the defendant. The declaration stated, that in consideration that the bankrupt would procure an insurance to be made on the ship *Jason*, and would procure six hundred pounds to be insured thereon by good and sufficient persons, the defendant promised that he would pay the bankrupt the premiums, and a reasonable sum for his trouble. The first question was, whether credit was given by the underwriters to the assured or to the broker, where the premium was not paid down at the time the assurance was made. *Milton*, the bankrupt, swore, that in *May 1764*, he was told by the underwriters that they should look upon him as their debtor, and that they would have nothing to do with the insured, which was considered at *Newcastle*, as the *London* practice : that from that time he had always acted on this plan, and had paid, since that time, one thousand pounds to underwriters, which he had never received. His commission was *five per cent.* *London* insurance brokers were then called, who said, they understood the underwriters looked to them only ; and that the underwriters did not once in ten times know who the insured were ; and that in case of failure, the underwriter came upon the effects of the broker ; the broker upon those of the insured.

Lord Mansfield said,—“ The plaintiff’s case is stronger than referring to the general usage in *London* ; for they act by a specifick rule, which they suppose to be the rule in *London* : and if the usage in *London* were doubtful, still the plaintiffs would be entitled to recover.”

There was a verdict for the plaintiffs.

Edgar and another,
assignees of
Carden v.
Fowler and another.
3 East’s R.
822.

In a late case, the question of credit for premiums, between the broker and underwriter, arose in an action brought by the assignees of a bankrupt underwriter, against the brokers for premiums supposed to have been received by the latter from the assured

assured for policies which they (the brokers) had procured the bankrupt to subscribe as an underwriter. For these very premiums the brokers had given the underwriter credit in their account with him, and had again taken credit for them in their account with the assured. The counsel in the cause, the very learned judge, (Mr. Justice *Le Blanc*,) before whom it was tried, and Lord *Ellenborough* and the other Judges of the court of *King's Bench*, before whom it was brought upon a case reserved for their opinion, never seem to have doubted, *that the underwriter may maintain an action directly against the broker for premiums.* But that case was decided, as to the main point, in favour of the broker, because the premiums in question were for re-assurances, which are illegal by the 19 G. 2. ch. 37. and which the broker had not *in fact* received from the assured, but only credit for them had been given in account between the broker and underwriter.

C H A P.
I.

Eightly, The day, month, and year, on which the policy is executed. This insertion seems very necessary, because by comparing the date of the policy with the date of facts which happen afterwards, or are material to be proved, it will frequently appear, whether there is any reason to suspect fraud or improper conduct on the part of the insured.

Mag. 34.

The ninth and last requisite of a policy of insurance is that it be duly stamped.

By several acts of parliament passed in this and the preceding reigns, various duties had been imposed upon policies of insurance; but by an act passed in the 35th year of *Geo. III.* for the purpose of imposing a new duty on marine insurances, it was by the 24th section of the statute positively declared, that all former duties on that species of insurance should, from and after the 5th day of *July 1795*, cease and determine, and be no longer paid or payable. By the 2d section of the act it is declared that the duty thereby imposed shall not extend, or be construed to extend, to insurances on lives or insurances from losses by fire.

35 Geo. III.
c. 63.

" For every skin, or piece of vellum or parchment, or sheet of
" paper, on which any insurance upon any ship or ships, goods
" or merchandize, or upon any other property, or interest
" whereon

Section 2.

C H A P. 1. " whereon insurances may lawfully be made, shall be engrossed,
 " written or printed, the stamp duties following upon the sums
 " insured ; that is to say, Where the sum to be insured shall
 " amount to one hundred pounds a stamp duty of two shillings
 " and sixpence, and so progressively for every sum of one hun-
 " dred pounds insured ; and where the sum to be insured shall
 " not amount to one hundred pounds, a like stamp duty of two
 " shillings and sixpence ; and where the sum to be insured shall
 " exceed one hundred pounds, or any progressive sums of one
 " hundred pounds each, by any fractional part of one hundred
 " pounds, a like stamp duty of two shillings and sixpence for each
 " fractional part of one hundred pounds : And that upon all and
 " every insurances or insurance, where the premium, or conside-
 " ration in the name of a premium, actually and *bonâ fide* paid,
 " given, or contracted for, shall not exceed the rate of ten shil-
 " lings, there shall be paid the following duties ; (that is to say,)
 " where the sum so to be insured shall amount to one hundred
 " pounds, a stamp duty of one shilling and three-pence, and so
 " progressively for every sum of one hundred pounds so insured ;
 " and where the sum so to be insured shall not amount to one
 " hundred pounds, a like stamp duty of one shilling and three-
 " pence ; and where the sum so to be insured shall exceed one
 " hundred pounds, or any progressive sums of one hundred
 " pounds each, by any *fractional* part of one hundred pounds,
 " a like stamp duty of one shilling and three-pence for such frac-
 " tional part of one hundred pounds ; which several duties
 " shall be payable and paid by the assured in such assurances
 " respectively."

Section 4. " Provided always, and be it further enacted, That upon all
 " and every such insurances or insurance, where the premium,
 " or consideration in the nature of a premium, actually and
 " *bonâ fide* paid, given, or contracted for, shall not exceed the
 " rate of ten shillings *per centum* on the sum insured, it shall be
 " lawful, in all cases where the sum insured shall amount to two
 " hundred pounds or upwards, to use stamps of two shillings
 " and sixpence for every two hundred pounds, of the sum insured,
 " instead of stamps of one shilling and three-pence for every one
 " hundred pounds of the like sums so insured."

" And

“ And be it further enacted by the authority aforesaid, That C H A P.
I.
Section 11.
 “ every contract or agreement which shall be made or entered
 “ into for any insurance, in respect whereof any duty is by this
 “ act made payable, shall be engrossed, printed or written, and
 “ shall be deemed and called, *A Policy of Insurance*; and that
 “ the premium, or consideration in the nature of a premium,
 “ paid, given, or contracted for, upon such insurance, and the
 “ particular risque or adventure insured against, together with
 “ the names of the subscribers and underwriters, and sums in-
 “ sured, shall be respectively expressed or specified in or upon
 “ such policy, and in default thereof every such insurance shall
 “ be null and void to all intents and purposes whatever (a).”

“ And be it further enacted by the authority aforesaid, That Section 12.
 “ no policy of insurance upon any ship, or upon any share or
 “ interest therein, shall be made for any certain term longer
 “ than twelve calendar months; and every policy which shall
 “ be made for any longer term shall be null and void to all in-
 “ tents and purposes.”

The 12th section of the statute provides for an allowance to Section 12.
 be made under certain circumstances by the commissioners, where
 the sums insured on homeward voyages shall be found to exceed
 the interest of the assured.

The 13th section provides that nothing contained in the act Section 13.
 shall prohibit the making of any alteration which may lawfully
 be made in the terms or conditions of any policy of insurance,
 duly stamped as aforesaid, after the same shall have been under-

(a) In a late case it appeared to be usual for the underwriters at *Lloyd's Coffee House*, Rogers v.
McCarthy,
Sittings
after Hill.
Term 1800.
 to put down upon a slip of paper all the risks they had taken in the course of the day;
 and one of the special jury said, they considered the party as bound by that slip, though
 he never signed a policy.

But Lord *Kenyon* said, that whatever obligation there might be in honour and good
 faith, he certainly would not be bound in law, for in order to enforce the claim of the
 assured in a court of justice, he must produce a *stamped policy*.

And in a still later case, the defendant being desirous of shewing that another under- Marliden v.
Reid.
3 East's Rep.
572.
 writer had subscribed the slip first, although the defendant's name appeared first on the
 policy. But Lord *Ellenborough* at the trial, and the court afterwards concurred with
 him, that the slip not being stamped could not be received in evidence, to contradict
 the written contract between the parties.

C H A P. written, or to require any additional stamp duty by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or contracted for, shall exceed the rate of 10*s.* per cent. on the sum insured, and so that the thing insured shall remain the property of the same person or persons, and so that such alteration shall not prolong the term insured beyond the period allowed by this act (see sect. 12.) and so that no additional or further sum shall be insured by reason or means of such alteration,

I. Two cases have recently occurred on this clause of the stamp act. In the first, *Kensington v. Inglis* and another in error from the court of C. P. 8 *East's Rep.* p. 273. goods and specie had been insured on ship or ships, which should sail between the first of October 1799, and the first of June 1800; a memorandum written on the policy on the 11th of June 1800, extending the time of sailing to the 1st of August 1800, does not require a new stamp, such alteration being protected by the 13th sect. of the 35 *Geo. 3. ch. 63*: for although the first of June was passed at the time when the alteration was made, the court of K. B. unanimously held, that the words, "so that the alteration be made before the determination of the risk originally insured," meant such a determination of it, as is occasioned by the loss or safe arrival of the thing insured, or by the final end and conclusion of the voyage, and there was no new subject of insurance introduced by the alteration.

But in the other case, decided in the subsequent term, *Hill v. Patten*, 8 *East's Rep.* p. 373, an action was brought on an insurance on *ship and goods* on a voyage on the Southern whale fishery, an alteration, by consent, after the ship sailed and the risk attached, having been made from an insurance on the *ship and outfit* to an insurance on *ship and goods*, cannot be made without a new stamp the subject-matter being essentially different, and therefore not falling within the 13th sect. of the stamp act. But the court said, it was not from their decision to be inferred that shifting successive cargoes on board the same ship, as in the *African* and other trades out and home may not properly be the subject of insurance under the word *goods*. This declaration contained but one count, namely, upon the altered policy; and Mr. *Hill* having

having become a bankrupt, his assignees brought another action, stating the policy as in its unaltered state; and contended that they had a right to recover, reading the policy as it originally stood. But the alteration being inserted in the body of the policy, Lord *Ellenborough* held that the alteration subsequent to the original subscription to the policy rendered it void, not being re-stamped, and the court, after much argument, upon a motion for a new trial, confirmed his Lordship's opinion. The name of the cause was *French v. Paton*, East. Term, 48 G. 3. See 1 *Campb. Nisi Prius*, p. 72, and 9 *East*, 351.

C H A P.
I.

By this section, a penalty of 500*l.* is imposed both on the persons procuring, and the brokers effecting insurances on policies not duly stamped; and the latter can neither demand their brokerage, nor the money expended for premiums; and by the 17th section, every underwriter subscribing such illegal policy is also liable to a like penalty of 500*l.*

Section 15.

Section 16.

By the ordinances of *France*, and other maritime countries, all policies of insurance must be registered; but no such regulation prevails in *England*, either by law, or in practice.

Ord. of
France,
art. 69. Tit.
Assurance.

CHAPTER THE SECOND.

Of the Construction of the Policy.

CHAP.
II.

1 Burr. 347.
Rooccus
Not. 18.

A POLICY of insurance, being a contract of indemnity, and being only considered as a simple contract, must always be construed, as nearly as possible, according to the intention of the contracting parties; and not according to the strict and literal meaning of the words. The mercantile law, in this respect, is the same in every part of the world; for from the same premises, the sound conclusions of reason and justice must ever be the same. Thus as the benefit of the insured, and the advancement of trade, are the great objects of insurance, policies are to be construed largely, in order to attain those ends: for it would be absurd to suppose that when the *end* is insured, the ordinary and usual means of attaining it can possibly be excluded; whatever, therefore, is done, by the master of the ship, in the usual course, necessarily, *et ex jussu causâ*, although a loss happen thereon, the underwriter shall be answerable.

1 Burr. 348.

But in the construction of policies, no rule has been more frequently followed than the *usage* of trade, with respect to the particular voyages or risks to which the policy relates: and in the cases about to be quoted in support of these principles, it will be found, that the learned judges have always called in the usage of trade, as the ground upon which the construction turns.

In stating the different cases upon this subject, as the point is nearly the same in all, the order of time, in which they were determined, is that which will be pursued, in order to prevent confusion.

Anonymous,
Skian, 243.

The first to be mentioned is an anonymous case in the time of *James* the second; but it is from a reporter of very good authority. A policy of insurance shall be construed to run until the

the ship shall have ended, and be discharged of her voyage; for arrival at the port to which she was bound, is not a discharge till *she is unloaded*: and it was so adjudged by the whole court upon a demurrer.

C H A P.
II.

But although this construction may be perfectly right, where the policy is general from *A.* to *B.* yet if it contain the words usually inserted, "*and till the ship shall have moored at anchor twenty-four hours in good safety,*" the underwriter is not liable for any loss, arising from seizure after she has been twenty-four hours in port: though such seizure was in consequence of an act of barratry of the master *during the voyage*, for if it were extended beyond the time limited in the policy, it would be impossible to lay down any fixed rule, and all would be uncertainty and confusion.

This was decided in an action on a policy of insurance on the ship *Hope* from *Hamburg* to *London*, subscribed by the defendant for two hundred pounds at one guinea *per cent.* At the trial before Mr. Justice *Buller*, at *Guildhall*, a verdict was found for the plaintiffs, subject to the opinion of the court, upon the following case: that the plaintiffs were interested in the ship to the amount of the sum insured. That in the course of the voyage, the master committed barratry by smuggling on his own account, by hovering, and running brandy on shore in casks under sixty gallons. That on the first of *September 1785*, the ship arrived in safety at her moorings in the river *Thames*, and remained there in safety till the twenty-seventh of the said month of *September*, when she was seized by the revenue officers for the smuggling before stated. That about three weeks after the seizure, the plaintiffs informed the underwriters thereof; and that they would hold them liable on the policy. That on the twentieth of *October*, the plaintiffs presented a petition to the commissioners of his majesty's customs, in which they imputed all the blame (which was certainly the truth,) to the captain, and praying that their vessel might be restored, on paying something to the seizing officer. The answer was, "that the prosecution must proceed, as the ship had been guilty of a gross violation of the laws, but that the owners should be at liberty to compound, according to the rules of the Exchequer." That the ship was appraised at the sum of three hundred and forty five pounds, and by the course of the court of Exchequer, the ship would

Lockyer and
others v.
Office,
1 Term
Reports,
p. 252.

C H A P. II. would have been restored to the plaintiffs, upon the payment of two hundred and thirty pounds, besides costs and charges, which would altogether have amounted to three hundred and twenty-nine pounds nine shillings and seven pence. That in *November*, a notice was indorsed on the policy, binding the underwriters for all costs and charges expended about the recovery of the ship. That this was shewn to the underwriters, who refused to subscribe it.

This case was fully argued, in the absence of Lord *Mansfield*, and the court having taken time to deliberate, Mr. Justice *Willes* pronounced their unanimous opinion. " There is no doubt in " this case, but that the master was guilty of barratry, by smug- " gling on his own account, without the privity of his owners. " Many definitions of barratry are to be found in the books, " but perhaps this general one may comprehend almost all the " cases : barratry is every species of fraud or knavery in the " master of the ship, by which the freighters or owners are *in-* " *jured*; and in this light a criminal or wilful deviation is bar- " ratry, if it be without their consent. The general question " here is, whether, as the loss, which was occasioned by the " barratry of the master, did not happen *during the continuance of* " *the voyage*, the insurers are liable ? I must own this appears " to me to be a novel question, and not to have been decided " by any former determinations. Difficulties occur on both " sides in laying down any rule. The first thing to be observed " is, that the policy, by the terms of it, is an undertaking *for a* " *limited time*, during the voyage from *Hamburg* to *London*, *till* " *the ship has moored twenty-four hours in safety*; and the ship was " not actually seized till near a month afterwards. But it has " been said that under the 24th of *George the Third*, chap. 47. " and the excise laws, the forfeiture attaches the moment the act " is done, and that the barratry was committed *during the* " *voyage*. It may be so as to some purposes, as to prevent inter- " mediate alterations or incumbrances; but I think the *actual* " property is not altered *till after the seizure*, though it may be " before condemnation. I will put this case; suppose, before " the seizure of the ship, she had gone another voyage, and on " her return had been seized, would the crown be entitled to an " account of her earnings, after deducting the expences of the " outfit ? surely not. Till the seizure, it was not certain that " the officers of the crown knew of the illicit trade carried on by " the

“ the master, or whether they would take advantage of the
 “ forfeiture. It would be a dangerous doctrine to lay down,
 “ that the insurers should, in all cases, be liable to remote con-
 “ sequential damages. This has been compared to a death's
 “ wound received during the voyage, which subjected the ship
 “ to a subsequent loss. To this point the case of *Meretony v.*
 “ *Dunlop*, seems very material. That was an insurance on a
 “ ship for six months ; and three days before the expiration of
 “ the time, she received her death's wound, but by pumping
 “ was kept afloat till three days after the time : there the ver-
 “ dict, under the direction of Lord *Mansfield*, was given for the
 “ insurer : and it was afterwards confirmed by the court. I
 “ will put another case : suppose an insurance upon a man's life
 “ for a year, and some short time before the expiration of the
 “ term, he receives a mortal wound, of which he dies after the
 “ year, the insurer would not be liable. The case of *Vallejo v.*
 “ *Wheeler*, was cited for the plaintiff, but that does not conclude
 “ this question, for there the ship was lost *during the voyage*.
 “ It was also argued, that this ship, even in the hands of a fair
 “ purchaser, would be liable to the forfeiture. I do not know
 “ that it ever has been so decided ; it may depend on circum-
 “ stances, such as length of possession, laches in seizing, or other
 “ matters. But suppose the law to be so, it does not follow
 “ from thence, that though the ship is *always liable to confisca-*
 “ *tion*, that the insurer at any distance of time is answerable for
 “ the loss, under a limited undertaking. And this brings me
 “ to that part of the case, which weighs most with the court,
 “ in favour of the defendant, and to which it does not appear
 “ to us, that any satisfactory answer has been given. It was
 “ agreed in the argument, that the custom house officers might
 “ seize for the forfeiture within three years after the fact com-
 “ mitted ; and that the attorney-general might file an informa-
 “ tion, at any time whilst the ship was in being. Is the insurer
 “ during all this time to continue liable ? Suppose the ship had
 “ gone several voyages afterwards ; and suppose a partial loss
 “ paid, and the underwriter's name struck off, shall an action
 “ be afterwards brought upon the policy ? His accounts could
 “ never be settled, nor could he be finally discharged, whilst
 “ the ship was in existence ; such a position would be mon-
 “ strous, and attended with infinite inconvenience. There must
 “ be some certain and reasonable limitation in point of time laid
 “ down by the court, when the insurer shall be released from
 “ his

C H A P.
 II.

Easter, 23
 Geo. III.
 B. R.

Vide post.
 c. 9.

C H A P.
II.

“ his engagement. If he be liable for a month, he may be for a year, and so on. We all think that the law of insurances would be left unsettled, and in much confusion, if any other time were allowed, than that prescribed by the policy, namely, *“ the continuance of the voyage, and the ship’s mooring twenty four hours in safety.”* Judgment for the defendant.

Lethullier’s
Case,
2 Salk. 443.

In an action upon a policy of insurance by the defendant at *London*, insuring a ship from thence to the *East Indies*, warranted to depart with convoy, the declaration shewed, that the ship went from *London* to the *Downs*, and from thence with convoy, and was lost. After a frivolous plea and demurrer, the case stood upon the declaration, and it was objected, that there was a departure without convoy. But by the court, the clause “ warranted to depart with convoy,” must be construed according to the usage among merchants, that is, from such place where convoys are to be had, *as the Downs*.

See Gordon
v. Morley,
post.

It is true, Lord Chief Justice *Holt* differed from the rest of the court, being of opinion that it was no part of the law of merchants to take convoy in the *Downs*. His lordship’s opinion, however, although it is one of the first legal authorities is certainly contradicted by practice, it being almost the invariable custom for the convoy to meet the merchant ships only in the *Downs*.

Bond v.
Gonsales,
2 Salk. 445.

Case upon a policy of insurance, which was to insure the *William* galley in a voyage from *Bremen* to the port of *London*, warranted to depart with convoy. The case was, the galley set sail from *Bremen*, under convoy of a *Dutch* man of war to the *Elbe*, where they were joined by two other *Dutch* men of war, and several *Dutch* and *English* merchant ships, whence they sailed to the *Texel*, where they found a squadron of *English* men of war and an admiral. After a stay of nine weeks, they set sail from the *Texel*: the galley was separated in a storm, taken by a *French* privateer, and retaken by a *Dutch* privateer, and paid eighty pounds salvage. It was ruled by *Holt*, Chief Justice, that the voyage ought to be according to *usage*, and that their going to the *Elbe*, though out of the way, was no deviation; for till after the year 1703, (prior to which time this policy was made,) there was no convoy for ships directly from *Bremen* to *London*, Verdict for the plaintiff.

The

The ship *Succes* was insured "at and from Leghorn to the port of London, and till there moored twenty-four hours in good safety." She arrived the 8th of July at Fresh Wharf and moored, but was the same day served with an order to go back to the *Hope*, to perform a fourteen days quarantine. The men upon this deserted her, and on the 12th of the month the captain applied to be excused going back, which petition was adjourned to the twenty-eighth, when the regency ordered her back; and on the thirtieth, she went back, performed the quarantine, and then sent up for orders to air the goods; but before she returned, the ship was burnt on the twenty-third of August, and now the question was, whether the insurer was liable?

C H A P.
II.

Waples v.
Eames,
2 Stra.
1243.

Lord Chief Justice *Lee* ruled, that though the ship was so long at her moorings, yet she could not be said to be there in good safety, which must mean the opportunity of unloading and discharging; whereas here she was arrested within the twenty-four hours, and the hands having deserted, and the regency taken time to consider the petition, there was no default in the master or owners: and it was proved, that till the fourteen days were expired, no application could be made to air the goods; whereupon the jury found for the plaintiff.

So where the ship *Hercules* was insured from *Bilboa* to *Rouen*, and till 24 hours moored in safety there. The ship arrived, an embargo having been previously laid on all *English* vessels in that port. The captain went on shore the day he arrived, and the next day the embargo was laid on his ship. He was afterwards permitted to land his cargo, which he delivered to his consignees, but the ship was detained as a prize, and the captain and crew allowed subsistence as prisoners of war, from the time of their arrival.

Minett v.
Anderson,
Peake 211.
Sitt. after
Hil. 34
Geo. III.

Lord *Kenyon*.—"She was as much within the power of the enemy, as if a guard had been put on board the moment she arrived. She could not be said to be 24 hours, or a minute, moored in safety, so far as relates to these plaintiffs, for immediately on her entering the port, she was to all intents and purposes captured by the *French*." Verdict for the plaintiffs.

But where a ship had arrived at the wharf, where she intended to unload, on the 12th January, and was laid on the outside of the

Anerfleish
v. Bell, Sitt.
22 Guildh.
after Term.
1795.

C H A P. II. the tier, there being no room to lay her in the inside; where the sails were unbent, top-masts struck, three anchors out, and she was also lashed to another ship, and so continued till the 19th, when several ships and a quantity of ice drove athwart her stern, forced her adrift, and she was wholly lost: Lord *Kenyon* was of opinion, that she was completely moored upon the 12th, and as the accident did not happen till above 24 hours after that time, the plaintiff was nonsuited.

In an insurance upon *freight*, if an accident happens to the ship before any goods are put on board, which prevents her from sailing, the insured upon the policy cannot recover the freight, which he would have begun to earn, if the goods had been shipped. The circumstances of the case were these:

Tonge v.
Watts,
2 Str.
1251.

The plaintiff insured *on ship and freight*, at and from *Jamaica* to *Bristol*. A cargo was ready to put on board; but the ship being careening, in order for the voyage, a sudden tempest arose, and she and many others were lost. The rigging and parts of her were recovered and sold, and the defendant paid into court as much as, upon an average, he was liable to for the loss of the ship: but the plaintiff insisted to be allowed six hundred pounds for the freight the ship *would have earned* in the voyage, if the accident had not happened. But as the goods were not actually on board, so as to make the plaintiff's right to freight commence; Lord Chief Justice *Lee* held, he could not be allowed it, and he was nonsuited.

Montgomery v.
Egginton,
3 Term R.
362.

But if the policy be a valued policy, and part of the cargo be on board when such accident happens, the rest being ready to be shipped, the insured may recover to the whole amount. This was so decided in an action brought by the assured on a policy on freight, valued at fifteen hundred pounds: In fact only five hundred pounds worth of freight was on board, when the ship was driven from her moorings and lost; but goods to the amount of the rest of the freight were ready to be shipped, and were lying on the quay for that purpose at the time.

Lord *Kenyon* Chief Justice, before whom the cause was tried, told the jury, that the question for their consideration was, whether this was a mere colourable insurance and a gaming policy?

policy? or whether it was a *bond fide* transaction? if the latter, the assured was entitled to recover for the whole value in the policy. The jury found the whole sum. The defendant's counsel obtained a rule for a new trial, which he afterwards abandoned, the court being strongly of opinion against him.

C H A P.
II.

So also in an *open* policy on freight, *at and from London and Teneriffe to any of the West India islands (Jamaica excepted,)* the underwriters were held liable to pay the insurance, though the ship sailed from *London* in ballast, and was captured before her arrival at *Teneriffe*, where the cargo was to be put on board. But as the ship was under a charter-party to *depart out of the river Thames, and proceed to Teneriffe, and there to load and receive on board from the freighters 500 pipes of wine, to be delivered in the West Indies, for the freight of which 500 pipes the freighters covenanted to pay 35s. per pipe;* the court held, that the instant the ship departed from the *Thames*, the contract for freight had its inception, and the plaintiff was entitled to recover. At the trial, the plaintiff had obtained a verdict, and the case was afterwards brought before the court upon a motion to enter a nonsuit. After argument at the bar,

Thompson
v. Taylor,
6 Term
R. 478.

Lord Kenyon said—"When this case came on at *nisi prius*, I thought the plaintiff was not entitled to recover; because I considered it as similar in every respect to that of *Tonge v. Watts*, and had it been so, my judgment now would have gone with that case. But this case depends upon its own peculiar circumstances. It is admitted, that if this contract had an inception, that the right to freight then commenced, and the policy attached. Now by the charter-party there was an inception of the contract, by the departure from the *Thames*; for the covenant in the charter-party was to go from the port of *London*. In the case from *Strange*, the inception of the contract would have been by taking the goods on board, which not being done, the insurance did not attach. In the case of *Montgomery v. Egginton*, there was an inception of the contract, and the plaintiff recovered. The case in *Strange* importantly differs from this; but I am now completely satisfied, though the case is new, that the plaintiff ought to recover."

Mr. Justice Grose—"In this case the freight begins to run in consequence of the ship's departure from *London*; the plaintiff therefore

C M A P. therefore has an interest in the voyage. But in *Tonge v. Watts*,
 II. the voyage was not begun, nor were the goods on board."

See post-
 ch 14

Mr. Justice *Lawrence*—"I think this plaintiff had an insurable interest: for it seems to me equally as strong an interest as the profits to arise from a cargo of molasses, which have been held to be an insurable interest. It is said that the plaintiff had a mere right of action against the freighter; and if he had not provided a cargo, though the plaintiff might recover against the freighter for breach of contract, yet he could not recover against the underwriters. It is true an insurance on freight could not have been recovered, if the ship had proceeded to the *West Indies* without one. But here, by a peril in the policy, the assured is prevented from earning a specific freight; and therefore the rule for entering a nonsuit must be discharged."

Mercantile
v. Swart.
 2 East. 400.

So where a ship was chartered on a voyage from *London* to *Dominica*, and back to *London*, at a certain freight upon the outward cargo, and after delivering her outward cargo at *Dominica*, the charterers were to provide her a full cargo homeward, at the current freight from *Dominica* to *London*, it was held, that an insurance, by the owner of the ship, on the freight at and from *Dominica* to *London*, attached while the ship lay at *Dominica*, delivering her outward cargo, and before any part of the homeward cargo, was shipped, during which time she was captured by an enemy, the contract of affreightment by the charter-party being entire, and the risk on the policy having commenced, and it being impossible to distinguish this case from that of *Thompson v. Taylor* (supra).

Cellar v. J
M. Vicar,
1 New Rep.
 23.

In the court of Common Pleas, in an insurance on freight on a voyage at and from *Demarara*, *Berbice*, and the *Windward and Leeward Islands* to *London*; the ship being at *Demarara*, an agreement (not in writing) was entered into by the master with a house there for a freight from *Berbice* to *London*; the cargo to be put on board at *Berbice*, and the ship to take a cargo of bricks and planks from *Demarara* to *Berbice*, and deliver them there; while the vessel was proceeding to *Berbice*, with this cargo on board, she met with an accident, and in consequence never earned her freight. This was held not to be a loss within the policy, for the voyage from *Demarara* to *Berbice* had nothing to do with the voyage insured

fured. The voyage insured was from *Demarara* to *London*, or from *Berbice* to *London*, or from any of the Windward or Leeward Islands, according to the place from which the ship might happen to sail on her voyage to *London*. Now, in this case, such voyage never commenced: the case itself excludes any inception of the voyage. The ship took in a cargo for *Berbice*, and then expected to get the cargo she was to carry to *London*.

C H A P.
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But subsequently to this, in the same court, in a policy on freight on board the ship *Stranger*, "at and from *London* to *Jamaica*, with liberty to touch at *Madeira*, and to discharge and take in goods there." It appeared in evidence, that the plaintiff, as owner, had agreed with one *De Franca*, by charter-party, that the ship should take in goods at *London*, and proceed to *Madeira*, and there deliver such part of the goods shipped at *London* as the agents of *De Franca* should direct, and receive on board wine, and proceed to *Jamaica*, and there deliver: and the freighter agreed to pay 135*l.* in full, for freight, during the whole voyage from *London* to *Madeira*, and from thence to *Jamaica*; such freight to be paid in *Madeira*, on delivery of the goods shipped at *London* for that place, by *Madeira* wine at 40*l.* per pipe, to be carried in the said ship free of freight. The ship arrived at *Madeira*, and delivered all her *London* cargo, except 33 casks of coals, which the captain kept on board to stiffen his ship. Part of the cargo for *Jamaica* was received on board, but not the wine to be paid for freight, when a gale arose, which obliged the captain to cut his cable and run out to sea, where he was captured. The court unanimously confirmed the verdict of the jury, holding the underwriters liable for a total loss of freight, for the contract of freight was entire, and the charter-party treats the whole as one voyage. The whole freight is to be paid in one gross sum, and that sum is to be paid in *Madeira* wine, valued at a certain sum at *Madeira*. The payment, therefore, is local and indivisible; and on payment of the freight in wine, it is to be carried on in this particular ship to *Jamaica*. Here the accident happened before the condition was performed, on which the freight was payable, namely, the delivery of the goods shipped at *London*.

Atty vs
Lindo,
1 New Rep.
236.

This case has already been mentioned on account of an alteration made in the policy after the time of underwriting; it shall now, however, be considered wholly independant of that circumstance.

Motteux
and others,
v. the Gov.
and Comp.
of London
Assur.
1 Ark. 545.

C H A P.
II.

circumstance. It was a bill filed in the court of Chancery, which stated, that the ship *Eyles*, late in the *East India Company's* service, was, in the year 1732, at *Bengal*, at which time the owner employed *I. H.* to insure the ship in the *London Assurance Office*, for five hundred pounds. The adventure thereon was to commence from her arrival at *Fort Saint George*, and thence to continue till the said ship should arrive in *London*, and that it should be lawful for the said ship, in the said voyage, to stay at any ports or places without prejudice, and that the ship was, and should be rated at interest or no interest, without farther account: in consideration whereof *I. H.* paid fifteen pounds premium. The *Eyles* came to *Fort Saint George* in February 1733, in her way to *England*; but being leaky, and in a very bad condition, upon the unanimous advice of the governor, council, commanders of ships, &c. she sailed to *Bengal* to be refitted, and after being sheathed, in her return upon her homeward bound voyage, she struck upon the *Engilee* sands, and was lost. Evidence was read on the part of the plaintiffs, to prove that *Bengal* was the most proper place to refit, and that she went thither for that reason; that this was a voyage of necessity, and not a trading voyage, for she took nothing on board, but water, provision, and ballast.

Lord Chancellor *Hardwicke*.—"As to the question, whether there has been a breach; or, in other terms, a loss, within the meaning of this policy? the general principles laid down by the plaintiff's counsel are right, that stress of weather, and the danger of proceeding on a voyage, when a ship is in a decayed condition, are to be considered. In such a case, if she went to the nearest place, I should consider it equally the same as if she had been repaired at the very place from which the voyage was to commence, according to the terms of the policy, and no deviation. It is a very material circumstance, that the governor ordered the lading to be taken out, to shew the necessity of the ship's being repaired, but there is not a syllable of proof why she might not have been equally well repaired at *Fort Saint George*. There is one part of this case which distinguishes it from all others whatever, and that is, as to the certain time the voyage was to commence. The fact is, the ship was lost in July 1733, three weeks before the time of making this policy, so that clearly the ship was not at *Fort Saint George* at the time the agreement

was

was made; and therefore it is a material question, whether it comes within the agreement?" His Lordship directed an issue to try, whether the loss in July 1733, was a loss during the voyage, and according to the adventure agreed upon; which issue was afterwards found for the plaintiffs, upon a trial in the Common Pleas.

CHAP.
II.

In a late case, it became a question, whether a voluntary burning of a ship, to prevent her from falling into the hands of the enemy, be a loss by fire, within the policy? Lord *Ellenborough* said, "The case is new, but I am clearly of opinion that the plaintiff is entitled to recover. Fire is expressly mentioned in the policy, as one of the perils against which the underwriters undertake to indemnify the assured; and if the ship is destroyed by fire, it is of no consequence whether this is occasioned by a common accident or by lightning, or by an act done in duty to the state. Nor can it make any difference whether the ship is thus destroyed by third persons, officers of the King, or by the Captain and crew, acting with loyalty and good faith. Fire is still the *causa causans*, and the loss is covered by the policy." The plaintiff had a verdict. Mr. *Campbell*, the reporter, very properly refers to *Pothier*, *Valin*, and *Emerigon*, to shew that this point has been decided in France as Lord *Ellenborough* has decided it, and certainly those authors support his Lordship's doctrine. *Pothier* traité du Contrat d'Assurance, l. 53. *Valin*. Liv. 3. tit. 6. des Assurances, Art. 26. i *Emerig.* p. 434.

Gordon v.
Rimington
i Campbell
N. P.
123

In an action upon a policy of insurance, before Lord Chief Justice *Hardwicke*, it was held, that the words "at and from Bengal to England," meant the first arrival at Bengal; and it was agreed, that when such words are used in policies, first arrival is always implied and understood.

1 Atk. 548.

It has likewise been held, that when a ship is insured at and from a place, and it arrives at that place, as long as the ship is preparing for the voyage upon which it is insured, the insurer is liable: but if all thoughts of the voyage be laid aside, and the ship lie there, five, six, or seven years, with the owner's privity, it shall never be said the insurer is liable; for it would be to subject him to the whim and caprice of the owner.

Chitty v.
Selwyn,
2 Atk 357

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Camden v.
Cowley,
2 Black,
417.

This was an action on a policy of insurance on a ship, at and from *Jamaica to London*. The ship had also been insured from *London to Jamaica* generally, and was lost in coasting the island, after she had touched for some days at one port there, but before she had delivered all her outward-bound cargo at the other ports of the island. This was an action on the homeward policy; and in order to shew when the homeward bound risk commenced, it was necessary to shew at what time the outward-bound risk determined; and the jury, which was special, after an examination of merchants as to the custom, by their verdict decided, that the outward risk ended when the ship had moored in any port of the island, and did not continue till she came to the last port of delivery.

2 Black.
418.

In the Trinity term following, a motion was made for a new trial, but it was refused; because it had been thoroughly tried, and no new light could be thrown upon it, although Lord *Mansfield* said, the inclination of his opinion at the trial was the contrary way. Mr. Justice *Wilmot* thought the construction put upon the policy by the jury was the right one.

Berriss v.
The London
Assurance.
Sittings
after Hilary
1782, at
Guildhall.

In a similar case, Lord *Mansfield* laid down the same doctrine to the jury, namely, that the outward risk *upon the ship* ended twenty-four hours after its arrival in the first port of the island to which it was destined: but that the outward policy *upon goods* continued till they were landed.

Leigh v.
Mather,
Sittings at
Guildhall,
after Michaelmas
Term,
1795.

The doctrine contained in the two last cases has me with material confirmation in a modern decision. It was an action upon a policy of assurance on *the ship Palliser*, and on *goods* on board thereof, on a voyage *at and from Georgia to Jamaica*. The ship arrived in *Montego Bay*, and moored at anchor, and there also the agent of the plaintiff sold and delivered the greatest part of the cargo to Messrs. *Adams* and *Hatton*, merchants there. The captain then entered into a charter-party with *Adams* and *Hatton*, to proceed from thence to *St. Anne's*, and there to take in a cargo for *London*. After unloading the greatest part of the cargo at *Montego Bay*, and remaining there a month, it was verbally agreed that the remainder of the cargo (which was lumber) should be carried as ballast to *St. Anne's*, and accordingly the

the vessel, after taking in some fullick, proceeded towards St. Anne's, but was wrecked, and never arrived there. For the plaintiff it was urged, that in such an insurance the ship might go from port to port; and that, at all events, the goods were protected by the policy, till they were all discharged and safely landed.

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Lord Kenyon was clearly of opinion, and was confirmed in that opinion by a Special Jury, to whom his Lordship particularly referred upon this occasion, that the risk on the ship ceased, after she had been moored at anchor twenty four hours in the first port of the island, for the purpose of unloading: and the facts disclosed in this case having manifested that Montego Bay was also the original destination of the cargo, and that its not being wholly delivered there was only prevented by a new agreement, the loss of the goods cannot be recovered under this policy of insurance. A ship insured to Jamaica generally cannot be permitted to go round the whole island, from port to port, for the purpose of unloading her cargo, especially where, as in this case, the owner of ship and goods is the same person. The plaintiff was nonsuited.

But the great and leading cases, upon questions of construction, are two, *Tiernay v. Etherington*; and *Pelly v. the Royal Exchange Assurance Company*: the former determined by Lord Chief Justice Lee, and the latter by Lord Mansfield. In these cases, the principles which are to be observed in the construction of policies are so fully considered, and the application of them to the particular circumstances of the different cases is made with so much accuracy and perspicuity, that they are to be regarded as the pole star to direct our enquiries upon all similar occasions.

The first of these causes was an action upon a policy of insurance "on goods, in a Dutch ship, from Malaga to Gibraltar, " and at and from thence to England and Holland, both, or " either: on goods, as hereunder agreed, beginning the adventure from the loading, and to continue till the ship and " goods be arrived at England or Holland, and there safely " landed." The agreement was, "that upon the arrival of the " ship at Gibraltar, the goods might be unloaded, and re-shipped " in one or more British ship or ships for England and Holland,

Tiernay v. Etherington, before Lee Chief Justice, 5 March 1743, 1 Burr. 348.

C H A P. "and to return one *per cent.* if discharged in *England.*" It appeared in evidence, that when the ship came to *Gibraltar*, the goods were unloaded, and put into a *store ship*, (which it was proved was always considered as a warehouse,) and that there was then no *British* ship there. Two days after the goods were put into the store ship, they were lost in a storm. The question was, whether this was a loss within the construction of the policy?

Lee, Chief Justice.—"It is certain, that in the construction of policies, the *strictum jus* or *open juris*, is not to be laid hold of: but they are to be construed largely, for the benefit of trade, and for the insured. Now it seems to be a strict construction, to confine this insurance only to the unloading and re-shipping, and the accidents attending that act. The construction should be according to the course of trade in this place; and this appears to be the usual mode of unloading and re-shipping in that place, *viz.* that when there is no *British* ship there, then the goods are kept in store ships. Where there is an insurance on goods on board such a ship, that insurance extends to the carrying the goods to shore in a boat. So, if an insurance be of goods to such a city, and the goods are brought in safety to such a port, though distant from the city, that is a compliance with the policy; if that be the usual place to which the ships come. Therefore, as here is a liberty given of unloading and re-shipping, it must be taken to be an insuring under such methods as are proper for unloading and re-shipping. There is no neglect on the part of the insured, for the goods were brought into port the nineteenth, and were lost the twenty-second of *November*. This manner of unloading and re-shipping is to be considered as the necessary means of attaining that, which was intended by the policy; and seems to be the same, as if it had happened in the act of unshipping from one ship into another. And as this is the known course of the trade, it seems extraordinary, if it was not intended. This is not to be considered as a suspension of the policy; for as the policy would extend to a loss, happening in the unloading and re-shipping from one ship to another, so any means to attain that end come within the meaning of the policy." The plaintiff had a verdict.

Afterwards

Afterwards a new trial was moved for; but it was refused by *Lee*, Chief Justice, Mr Justice *Chapple*, and Mr. Justice *Denison*, against the opinion of Mr. Justice *Wright*.

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Easter
Term,
1743.

Pelly v. The
Governor
and Comp
of the Royal
Exchange
Assurance,
1 Burr. 346.

The next of these causes came before the court upon a case reserved for their opinion, after a trial and verdict for the plaintiff, at *Guildhall*, before Lord *Mansfield*. It was an action of covenant upon a policy of insurance.

The case states, that the plaintiff, being part owner of the ship *Onslow*, an *East India* ship, then lying in the *Thames*, and bound on a voyage to *China*, and back again to *London*, insured it "at and from *London*, to any ports or places beyond the *Cape of Good Hope*, and back to *London*, free from average under ten per cent. upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the said ship: beginning the adventure upon the said ship from and immediately following the date of the policy, and so to continue and endure until the ship shall be arrived as above, and there anchored twenty-four hours in good safety." The perils mentioned in the policy were the common perils, viz. "of the seas, men of war, fire, &c." The ship arrived in the river *Canton*, in *China*; where she was to stay to clean and refit, and for other purposes. Upon her arrival there, the sails, yards, tackle, cables, rigging, apparel, and other furniture, were, by the captain's order, taken out of her, and put into a warehouse, or storehouse, called a bank-saul, built for that purpose on a sand bank, or small island, lying in the said river, near one of the banks called *Bank-saul Island*, in order to be there repaired, kept dry, and preserved, till the ship should be heeled, cleaned, and refitted. Some time after this, a fire broke out in the bank-saul, belonging to a *Swedish* ship, and communicated itself to another bank-saul, and from thence to that belonging to the *Onslow*, and consumed the same, together with all the sails, yards, &c. belonging to the *Onslow* that were therein. The case states further, that it was the universal and well known usage, and has been so for a great number of years, for all *European* ships, which go a *China* voyage, except *Dutch* ships, (who for some years past have been denied this privilege by the *Chinese*, and who look upon such denial as a great loss,) when they arrive near this *Bank-saul Island*, in the river *Canton*, to unrig the ships, and

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to take out their sails, yards, tackle, cables, rigging, apparel, and other furniture; and to put them on shore in a bank-saul, built for that purpose on the said island (in the manner that had been done by the captain of the *Onslow*, on the present occasion) in order to be repaired, kept dry, and preserved, until the ships should be heeled, cleaned, and refitted. The case adds, that so doing is prudent, and for the common and general benefit of the owners of the ship, the insurers, and insured, and all persons concerned in the safety of the ship. The ship arrived from her said voyage in the *Thames*, having been again rigged, and put in the best condition the nature of the place and circumstances of affairs would permit. The question for the opinion of the court was, whether the insurers are liable to answer for this loss, so happening upon the bank-saul, within the intent and meaning of this policy?

The court, after a solemn argument, took time to consider the question, and then Lord *Mansfield* delivered the unanimous opinion of the court for the plaintiff.

Lord *Mansfield*.—"By the express words of the policy, the defendants have insured the tackle, apparel, and other furniture of the *Onslow*, from fire, during the whole time of her voyage, until her return in safety to *London*, without any restriction. Her tackle, apparel, and furniture, were inevitably burnt in *China*, during the voyage, before her return to *London*. The event then, which has happened, is a loss within the general words of the policy; and it is incumbent upon the defendant to shew, from the manner in which this misfortune happened, or from other circumstances, that it ought to be construed a peril, which they did not undertake to bear. If the chance be varied, or the voyage altered, by the fault of the owner or master of the ship, the insurer ceases to be liable; because he is only understood to engage that the thing shall be done safe from fortuitous dangers, provided due means are used by the trader to attain that end. But the master is not in fault, if what he did was done in the usual course, and for just reasons. The insurer, in estimating the price at which he is willing to indemnify the trader against all risks, must have under his consideration the nature of the voyage to be performed, and the usual course and manner

manner of doing it. Every thing done in the usual course must have been foreseen, and in contemplation at the time he engaged; he took the risk, upon a supposition, that what was usual or necessary should be done. In general, what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy, and to make a part of it, as much as if it were expressed. The usage, being foreseen, is rather allowed to be done, than what is left to the master's discretion, upon unforeseen events: yet if the master, *ex justâ causâ*, go out of the way, the insurance continues. Upon these principles it is difficult to frame a question, which can arise out of this case, as stated. The only objection is, that they were burnt in a bank-faul, and not in the ship; upon land, not at sea, or upon water: and being appertinent to the ship, losses and dangers ashore could not be included. The answer is obvious: First, the words make no such distinction: Secondly, the intent makes no such distinction. Many accidents might happen at land, even to the ship. Suppose a hurricane to drive it a mile on shore; or an earthquake may have a like effect; suppose the ship to be burnt in a dry dock, or suppose accidents to happen to the tackle upon land, taken from the ship, while accidentally and occasionally refitting, as on account of a hole in its bottom, or other mischance: these are all possible cases. But what might arise from an accidental repair of the ship is not near so strong as a certain, necessary consequence of the ordinary voyage, which the parties could not but have in their direct and immediate contemplation. Here the defendants knew that the ship must be heeled, cleaned, and refitted, in the river of *Canton*: they knew that the tackle would then be put in the bank-faul: they knew it was for the safety of the ship, and prudent that they should be put there. Had it been an accidental necessity of refitting, the master might have justified taking them out of the ship, *ex justâ causâ*: but describing the voyage is an express reference to the usual manner of making it, as much as if every circumstance was mentioned. Was the chance varied by the fault of the master? It is impossible to impute any fault to him. Is this like a deviation? No: 'tis *ex justâ causâ*, which always excuses. Had the insurers in this case been asked, whether the tackle should be put in the bank-faul? they must, for their own sakes, have insisted that it should. They would have had reason to complain, if, from their not being put there, a misfortune had happened.

In

C H A P. In such a case, the master would have been to blame, and by his
II. fault would have varied the chance. They have taken a price
 for standing in the plaintiff's place, as to any losses he might sustain in performing the several parts of the voyage, of which this was known and intended to be one. Therefore, we are all of opinion, that in every light, and in every view of this case, in reason and justice, and within the words, intent, and meaning of this policy, and within the view and contemplation of the parties to the contract, the insurers are liable to answer for this loss."

Brough v. Whitmore, 4 Term R. 206. See post for another point.

Noble and others v. Kennoway, Dougl. 492.

This case has since been confirmed by Lord *Kenny*, and the whole court of King's Bench.

So also in another case, the same principles were adhered to, and the same rule of decision was adopted. The insurance was upon the ships the *Hope* and the *Anne*, at and from *Dartmouth* to *Waterford*, and from thence to the port, or ports, of discharge, on the coast of *Labrador*, with leave to touch at *Newfoundland*, and upon any kinds of goods and merchandizes; and also on the ships, till they should be arrived at their port of discharge, and should have moored at anchor *twenty-four hours, and on the goods until the same shall be there discharged, and safely landed*. By a clause in the policy, money advanced to the fishermen was insured. The *Anne* arrived safe on the coast of *Labrador* on the 22d of *June*, and the *Hope* on the 14th of *July* 1778. From the time of their arrival, the crews were employed in fishing; and had taken out none of their cargoes, except at leisure hours (partly on *Sundays*) such things as were immediately wanted. On the 13th of *August*, an *American* privateer entered the harbour, and took both the vessels, there being at that time nobody on board either of them. The action was brought to recover the value of the goods. The defence was, that there had been an unnecessary delay in unloading the cargoes, in consequence of which they had been exposed to capture, and that the underwriters ought not to be liable for what had happened from the negligence of the insured. The plaintiffs rested their case on the words of the policy, and the usage of the trade. They called the captain of the *Anne*, who swore, that he had been the same voyage three times in the three last years, and that they had

had proceeded in the same manner during each of the voyages; that he did not think the plaintiffs had warehouses sufficient to have held the goods if they had been landed; and that there were no settlements on the coast of *Labrador*, but those belonging to the plaintiffs. One of the sailors swore to the same effect. The plaintiffs then called one *French*, to prove the custom of the *Newfoundland* trade. This evidence was objected to; but Lord *Mansfield* admitted it, and the witness swore, that, in the *Newfoundland* trade, it is customary to keep their goods on board several months, and that sometimes they have part of their homeward cargo of fish, and part of their old cargo on board at the same time. That the first object is to catch fish, and they unload only at times when they cannot fish. The old cargo being chiefly salt and provisions, it is taken out gradually for curing the fish, and for consumption. The testimony of this witness was confirmed by one *Newman*. Neither *Newman* nor *French* had been at *Labrador*. Mr. *Hunter* was then called, who proved, that some years since, he used to send vessels of his own, and also chartered vessels to *Labrador*, and that it was usual, in chartering vessels, to stipulate that they should have sixty days allowed for discharging. That he apprehended they were oftentimes longer in fact, and that it was not so easy to discharge a cargo at *Labrador* as at *Newfoundland*. Upon this evidence a verdict was found for the plaintiffs, and in the subsequent term the defendant moved to set it aside, which was not granted.

Lord *Mansfield*.—"The trade of fishing on the coast of *Newfoundland*, especially from the west of *England*, has been known and practised for many years. Since the treaty of *Paris*, a new trade has been opened to *Labrador*. The insurance here is on the ships, and on the goods till landed. The defendant says, the plaintiffs have been guilty of an unreasonable delay in landing. That question was to be tried by the jury, and could only be decided by knowing the usual practice of the trade. Every underwriter is presumed to be acquainted with the practice of the trade he insures, and, that, whether it is recently established or not. If he does not know it, he ought to inform himself. It is no matter if the usage has been only for a year. This trade has existed, and has been conducted in the same manner for three years. It is well known, that the fishery is the object of the voyage, and the same
 sort

CHAP. II. { sort of fishing is carried on in the same way at *Newfoundland*. I still think the evidence on that subject was properly admitted, to shew the nature of the trade. The point is not analogous to a common law custom."

Mr. Justice *Buller*.—"I think there was sufficient evidence, without calling in aid the usage of the *Newfoundland* trade; for it appeared on the face of the policy, that the fishery was the purpose of the voyage: but I think the evidence objected to was properly admitted. If it can be shewn, that the time would have been reasonable in one place, that is a degree of evidence to prove that it was so in another. The effect of such evidence may be taken off by proof of different circumstances. It is very true, that the custom of one manor is no evidence of the custom of another; that has been determined in many cases: but the point here is very different; it is a question concerning the nature of a particular branch of trade."

Since Lord *Ellenborough* was Chief Justice of the *King's Bench*, a case arose in which his Lordship and the other judges very fully considered the rules which are to govern the construction of policies of insurance, and the effect of written words upon the usual printed form of this species of contract.

Robertson
v. French.
4 East, 130.

It was an action on a policy of insurance, "lost or not
"lost, at and from (a) *all, any, or every port and place where*
"and whatsoever on the coast of *Brazil*, and after the 17th
"day of September to the Cape of Good Hope, upon any kind of
"goods and merchandizes, and also upon the body, &c. of the
"ship, *Chesterfield*, &c. beginning the adventure upon the said
"goods and merchandizes from the loading thereof, aboard the
"said ship at *all, any, or every port and place where or whatsoever*
"on the coast of *Brazil*, and from the 17th September 1800, and
"upon the said ship, &c. in the same manner; and so shall con-
"tinue and endure during her abode there, upon the said ship,
"&c.; and further until the said ship, &c. and goods, &c. shall
"be arrived at *Simon's Bay or Table Bay, both or either, with liberty*
"to call at *S^t. Helena, or elsewhere*, upon the said ship, &c. and
"upon the goods, &c. until the same be there discharged, at
"the rate of four guineas per cent. to return three pounds ten shil-

(a) The written parts of the policy are printed in italicks.

“ *lingo* ”

“ *lings, should the ship have arrived or this risk otherwise have ceased, on or before the 17th of September.*” By a memorandum the ship, goods and freight were all valued. This is the whole of the policy that seems to me to be material; the facts touching this part of the case were, that the goods were taken in at the Cape of Good Hope, and the ship went from thence in February 1800, to Benguela, on the coast of Africa, and afterwards to St. Catharine’s, on the coast of Brazil, on the 30th of May, then to Rio Janeiro on the 27th July, staid there upwards of two months, and remained on the coast till the latter end of November, when on suspicion of illicit trading with the Spanish enemy, she was taken possession of by some of His Majesty’s ships of war, and carried again to the Cape, *with the original cargo on board* (but none was ever taken in at Brazil), where she was libelled by the captors in the Vice-admiralty court there, on which the assured abandoned to the underwriters; and the ship, after being liberated by the sentence of the court, was sold there, and has since arrived in England. The question, on this part of the case was, whether *as no goods were ever loaded at Brazil*, neither ship or goods were covered by the policy in question. The only case referred to in the argument at the bar was *Hodgson v. Richardson*, 1 Black. Rep. 463. (post. Chap. “Of Fraud in Policies.”) The court decided against the claim of the plaintiffs, thus holding that the policy never attached, as no goods were loaded at Brazil. In delivering the judgment of the court, upon a rule to enter a nonsuit, amongst other topics, the following general rules in the construction of policies, was laid down by Lord Ellenborough. Secondly, It has been argued that the policy on this ship and cargo never attached, the adventure of the cargo being by the terms of the policy made to commence from the loading the goods aboard the ship on the coast of Brazil; an event which, as it was contended by the defendant, never happened, inasmuch as *the goods were not loaded there, but at the Cape of Good Hope*. It was also contended, on the part of the defendant, that the adventure on the ship being by the terms made to begin *in the same manner* with that on the goods, could of course have no commencement, if that on goods never attached. In the course of the argument, it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable

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applicable to the terms of other instruments, and [in all other cases: it is therefore proper to state on this head, that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, namely, *that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it*, which terms are themselves to be understood in their plain, ordinary and popular sense, *unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense.* The only difference between policies of assurance and other instruments in this respect, is, that the greater part of the printed language of them, being invariable and uniform, has acquired from use and practice a known and definite meaning, and that the words superadded in writing (subject indeed always to be governed in point of construction by the terms and language with which they are accompanied) are entitled nevertheless, *if there should be any reasonable doubt upon the sense and meaning of the whole*, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula, adapted equally to their case, and that of all other contracting parties upon similar occasions and subjects. His Lordship, then, after a very nice, critical and grammatical discussion of the words used, said, "Is there any thing to be found in the policy which assigns to these words a sense apparently different from the ordinary grammatical sense of them? And looking as we are obliged to do to the policy, and to the policy alone, in order to collect the intention of the parties as to the commencement and duration of the adventure thereby protected, we cannot feel ourselves at liberty to disjoin in point of effect and construction the words "*at all, or any port or place on the coast of Brazil,*" from the words, "*from the loading thereof aboard the said ship,*" by which they are immediately preceded, and with which by immediate context they appear to us to be necessarily united. If the same words had not been thus incorporated with the

body of the text of the printed words, and made to form there-with one entire and continued chain of words, and one unbroken sentence of intelligible expressions, all applicable to the same subject-matter, it might have been open to us to have given them a different meaning, and to have considered them as words written in the margin of the policy (and applying therefore indefinitely to the whole of the policy, and not to any particular part of it) are usually considered; that is, as controuling the sense of such parts of the printed policy to which, in sound construction, and by reasonable reference, they may appear to apply. As for instance, where the word *ship* is written in the margin of the policy, or *freight* or *goods*; in such cases, the general terms of the policy, applicable to other subjects, besides the particular one mentioned in the margin, are thereby considered as narrowed in point of construction to that one. And this is done in cases where the subject meant to be insured is still more remote from "ship and goods," the only subjects of insurance in the printed policy; namely, where the object of insurance, as declared by the marginal memorandum, is, money lent on *bottomree*, or at *respondentia*, or the like: the meaning of which marginal memorandum may be translated thus: we mean to insure the subject so named, "freight," for instance, arising or accruing during the limits of the voyage within described, from the carriage of goods on board the ship named against the perils within enumerated, and upon the premium herein specified. In other words, we adopt the general language of the policy, as far as it may serve to effectuate this object, and no further." The rule for entering a nonsuit, in the particular case, was made absolute. But I have given thus much of Lord *Ellenborough's* argument, not so much for the decision of the particular case, as for the importance of the rules of construction, which his Lordship has, in many instances, confirmed, and in all so clearly elucidated.

Although the decisions in all the above causes, notwithstanding the vast variety of circumstances that are to be found in them, are so uniform in principle; and although we find, that the learned judges make a constant reference to the usage of trade; yet in no instance whatever has this been so apparent as in the cases of insurance upon *East India* voyages, in which the insurers

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insurers have been held liable, not only for events which may possibly happen from the port of discharge to that of delivery; but also for all intermediate or country voyages, upon which the ship may be dispatched by the order of the council of any of the *East India* Company's settlements abroad.

It is not that, in these cases, the judges have given a greater latitude to the usage of trade, than in any other; but because, from the great variety of cases that have arisen upon the subject, the usage with regard to the *East India* voyage is more notorious, and better established than in those where the question has but seldom occurred. The grounds and reasons of such decisions seem to have been the terms in which all the printed charter-parties of the *East India* Company are conceived. By those charter parties, liberty is given to prolong the ship's stay for a year; besides which, it is very common by a new agreement to detain her a year longer: and the longer a ship is kept, it is the more beneficial to the owners. The words of the policy, too, are adapted to this usage, being without limitation of time or place, and without any reference to the first voyage particularly mentioned in the charter party. These charter parties, being printed, are matter of public notoriety; and are so generally and universally known, or may be so, by an enquiry at the *India House*, that the chance of her stay is always one of the risks insured: and both the insured and insurer must be supposed to be fully apprized and sufficiently conscious of it. Indeed, the understanding of the policy depends so much on the course and usage of the *East India* trade, that it seems to be contradictory to the policy to say, that the underwriter did not underwrite for a country voyage.

All these principles were fully laid down by Lord *Mansfield* in a very few years after he took upon him the administration of justice in this country; and they have been frequently recognized, and invariably pursued in a multitude of decisions upon such policies since that time. The learned chief justice, when he laid down these rules, as the ground of his then opinion, and as the guide of future decisions, said he did so, because the court esteemed this to be the most convenient way of determining the question: for whoever should thereafter insure on an

East India ship would know, that he insured the contingencies, and might take proper precautions against them, if he pleased. Whereas if every person should be obliged to open to the insurer all the grounds of his expectations about the ship's continuance in the *East Indies*, or coming to *England*, it might produce great litigation and confusion in cases arising upon these policies.

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The cases, in which these principles as to *East India* voyages were first settled, were the nine causes tried upon the ship *Winchelsea*, an *East Indiaman*; in all of which the policies were the same, the parties only being different; and all of which were at first tried with various success; but the nine verdicts were ultimately uniform for the plaintiffs, the insured, against the underwriters.

Salvador v.
Hopkins,
3 Burr.
1797.

The charter party was in the usual printed form, and contained a clause, empowering the company's servants abroad to detain the ship a year longer, if they pleased, than the time originally limited by the charter party. The insurance was in these words, "at and from *Bengal*, to any ports or places whatsoever in the *East Indies*, *China*, *Persia*, or elsewhere, beyond the *Cape of Good Hope*, forwards and backwards, and during her stay at each place, until her arrival at *London*, on money, &c." On the 25th of *March* 1762, the ship sailed; on the nineteenth of *September*, in the same year, she arrived at *Bombay*; and early in the *November* following, she left *Bombay* the first time. The ship arrived at *Calcutta* in *Bengal*, on the fifth of *March* 1763; and on the twenty-eighth of the same month, the president and council of *Bengal* entered into a new agreement with the captain, reciting, that the charter party would expire on the eleventh of *February* 1764, but that the president and council, finding it expedient to detain the ship in *India*, and being desirous of having the time limited in the charter party prolonged, &c. the indenture therefore witnesseth, that the captain lets the ship to freight for one whole year from the said eleventh of *February* 1764. The ship arrived at *Bombay* a second time in *July* 1763: in *December* following, she again sailed for *Bengal*, and arrived there early in 1764; on the nineteenth of *March* in that year she left *Bengal*, in order to proceed for *Bombay*, and on the twenty-first of that month, subsequent to the expiration of the old charter party, the ship was lost. On the

C H A P. ^{U.} third of *April* 1764, Mr. *Hume*, the plaintiff in several of these actions, received a letter from the captain, dated the fourteenth of *April* 1763, inclosing a copy of the new agreement; which letter was publicly read in a coffeehouse. The next day after the receipt of the letter, some insurances were made by Mr. *Hume*. On the 17th of *July* 1764, other insurances were effected by Mr. *Hume*, and all the other insurances were made, after the captain's letter, of the fourteenth of *April* 1763, had been received and publicly read in a coffeehouse.

3 Burr.
1713.

The court, after laying down all those principles above stated, respecting the notorious usage of this branch of trade, enlarged upon the circumstances peculiarly distinguishing these causes. "No mention was made, or question asked, at the time of underwriting, when the ship was chartered; when she sailed from *England*; when she arrived in *India*; whether she was detained a year according to the proviso in the charter party: and yet her continuance in the *East Indies* depended upon all these facts. If they ought necessarily to be disclosed, the policy was void, to the knowledge of the underwriters, at the time they took the premium. The evidence in all the causes was very strong, that her staying a year longer, if known, would not have varied the premium. This ship was insured at the same premium after the prolongation of her stay in *India* was known. None of the defendants desired to be off, after they knew that an account of the new agreement had been received in *England* upon the third of *April* 1764, which was notorious to them all, before the intelligence of her loss, which came in the *October* following. So that if there had been any force in the objection, it would have been waved by the acquiescence of the underwriters, after they were fully apprized of the whole."

Gregory v.
Christie,
B R Trin.
24 Geo. III.

So also, in an action upon a policy "on the goods, specie, and effects, of the plaintiff, on board the ship on her voyage from *London* to *Madras* and *China*, with liberty to touch, stay, and trade, at any ports or places whatsoever," a similar question arose upon the following facts. When the ship arrived at *Madras*, she was too late to go to *China* that year; upon which she was employed by the council there to go from *Madras* to *Bengal* to fetch rice, which voyage she performed once, and

in

in attempting to perform it a second time, was lost. The jury found a verdict for the plaintiff.

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A new trial was afterwards moved for on two grounds, one of which only is material here, that these intermediate voyages were not insured under the policy; for that the words "to touch, stay, and trade at any ports or places whatsoever," only meant, to give a licence to stay at such places as it should be necessary to stop at *in the course of the voyage*.

Vide *supra*,
C. I. p. 14.
where the
other point
is stated.

Lord Mansfield.—"To understand this policy you must refer to the course of trade to which it relates. What is the course of trade with the *East India Company*? If an *India* ship come to *Madras* too late in the season to proceed to *China*, the council employs her in an intermediate voyage. It is beneficial to all parties so to employ her; the underwriters are perfectly well acquainted with this usage, and are bound to take notice of it. Before the year 1780, it was usual to insure both the outward and homeward bound voyage in one policy, and then the words "*backwards and forwards*" were inserted: but since that time, they have separated the insurance, and insure the outward voyage in a distinct policy. The policy in question differs from others; because it contains a permission to trade, as well as to *touch and stay* at any ports or places, which is not usual in policies of this nature: for in general they only permit them to *touch and stay*, which words can only be intended to give a permission so to do, if necessity oblige them; but to *touch, stay, and trade*, are words so large, that they seem to include the intermediate voyage. It would narrow the construction very much, indeed, to say that the policy relates to those places *only*, at which they shall stop *in the voyage*. The words made use of certainly take in the intermediate voyage; and the usage of trade confirms this construction." The consequence of this opinion was, that the verdict of the jury was held to be right.

So also, in an action on a policy of insurance upon the ship *Blandford*, "at and from *London* to *Madras* and *Bengal*, beginning the risk upon the said ship, &c. at *London*, and so to continue till the arrival of the said ship at *Madras* and *Bengal*, with liberty to touch and stay at any port or place in this

Farquharson
v. Hunter,
B. R. Hilary
25 Geo. III.

C H A P. 11. "voyage:" the facts were these. The *Blandford* arrived at *Madras*, where her cargo was unloaded, by order of the presidency; she was then sent for rice to *Vijagipatnam*, and by an entry in the council book, her voyage to *Bengal* is said to be postponed. That part of her outward-bound cargo, which was intended for *Bengal*, was sent thither in the *Lord Mulgrave*, and afterwards the *Blandford* was sent to *Bengal* in ballast, and was taken in the passage; for which loss this action was brought. At the trial, Lord *Mansfield* thought the words in the policy would not admit of such a latitude of construction, as to take in the intermediate voyage, the words being much narrower than those in *Gregory v. Christie*: upon which the plaintiff was nonsuited.

However, in the following term, when a motion was made to set aside the nonsuit, his Lordship said, "This is a policy on the ship: it is an *India* voyage; and the usage as to the intermediate voyages is notorious to both parties; and the contract refers to it. The insurance here is from *London* to *Madras* and *Bengal*. What is the usage of the trade? That when the ships arrive at *Madras*, the council may send them elsewhere."—The other judges concurred; and the rule for setting aside the nonsuit was made absolute.

From these cases it is evident, that in the construction of *East India* policies, whether the words be large and comprehensive, as in *Salvador v. Hopkins*, and *Gregory v. Christie*; or restrained and limited as in the last case, the usage of trade shall always be considered, and the intermediate or country voyages held to be insured. At the same time, though the general rule be so, the parties contracting may, by their own agreement, prevent such a latitude of construction; and so Lord *Mansfield* said in *Salvador v. Hopkins*. In order to do this, it is not necessary that express words of exclusion should be inserted in the policy; but if, from the terms used, the court can collect that such was the intention of the parties, that construction which is most agreeable to their intention shall most assuredly prevail.

Lavabre v.
Wilson, and
Lavabre v.
Walter,
Doug. 284.

Thus, in an action upon a policy, the voyage insured was described in these words: "at and from *Port L'Orient* to *Pondicherry*, *Madras*, and *China*, and at and from thence back

"to

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“ to the ship’s port or ports of discharge in *France*, with liberty
 “ to touch, in the *outward or homeward-bound voyage*, at the isles
 “ of *France* and *Bourbon*, and at all or any other place or places
 “ what or wheresoever.” In a subsequent part of the policy
 there was this clause, “ and it shall be lawful for the said ship
 “ in this voyage, to proceed and sail to, and touch and stay at
 “ any ports or places whatsoever, as well on this side as on the
 “ other side of the *Cape of Good Hope*, without being deemed a
 “ deviation.” The ship arrived at *Pondicherry*, and after re-
 maining there one month, she sailed for *Bengal*, instead of going
 to *China*; having wintered at *Bengal*, and received considerable
 repairs, she returned to *Pondicherry*; and having taken in a
 homeward-bound cargo, proceeded in her voyage back to
L’Orient, but was taken by the *Mentor* privateer. The question
 in that case, as far as it is material to us in this part of our
 work, was, Whether the voyage to *Bengal* was insured within
 the construction of this policy? The reporter of this case says, Mr. Douglass
 it was insisted, in the opening for the plaintiffs, that, under the
 general liberty given by the policy, of touching at all places
 whatsoever, the vessel might go to *Bengal*, which, by the ope-
 ration of those words, was as much part of the voyage as if it
 had been expressly named.—Lord *Mansfield*, however, having
 intimated a clear opinion, that the general words were, by the
 expressions of “ in the outward or homeward-bound voyage,” and
 “ in this voyage,” qualified and restrained so as to mean all
 places whatsoever in the usual course of the voyage “ to and from
 “ the places mentioned in the policy,” this ground was immediately
 abandoned, and never farther mentioned by the counsel for the
 plaintiffs in the progress of these causes,

But although the judges have been thus liberal in their con-
 structions of this contract, and have gone as far as possible to
 effectuate the intention of the parties; yet they have never ex-
 tended those equitable principles to such a length as to say, that
 when a man has insured one species of property, he shall recover
 damage which he has suffered by the loss of a description of
 property different from that named in the policy. Thus a man,
 who has insured a cargo of goods, cannot recover under such a
 policy, the freight which he has paid for the carriage of that
 cargo; nor shall it be permitted to an owner of a ship, who
 insures the ship merely, to demand satisfaction for the loss of

See post, 70

C H A P. merchandize laden thereon, or to ask from the insurers *extraordinary wages paid to the seamen, or the value of provisions consumed*,
 II. by reason of the detention of the *ship* at any port longer than was expected.

Such attempts have, indeed, been made, but they have always been resisted; for to admit of such demands would introduce an infinite variety of frauds, and would be repugnant to the most settled maxims of insurance law, and to the constant practice and usage of trade. In *Molloy* it is said, that if a merchant insure a ship generally, and the ship then happen to be laden, and if it afterwards miscarry, the insurer shall not answer for the goods, but only for the ship. This position stands uncontradicted by any foreign writer ancient or modern, and is supported by several decisions of the first authority in this country.

*Molloy, b. 2.
c. 7. l. 8.*

*Roccus de
Assicur.
Not. 16.*

*Fletcher and
others v.
Poole, Sitt.
after East.
1769, before
Lord Mans-
field at
Guildhall.*

In an insurance upon the ship *Tartar* at and from *London* to *Newcastle* and *Marseilles*, and at and from *Marseilles* to her discharging port or ports in the *West Indies* (*Jamaica* excepted), the facts were, that the ship being distressed bore away for *Minorca*, and put into *Port Mahon*, where the captain obtained leave from the vice-admiralty court to have his ship surveyed, in consequence of which, she was long detained; and the action was brought to recover the extraordinary wages, and the provisions expended during the detention for these repairs.

Lord Mansfield was of opinion, that such articles as sailors' wages and provisions expended, while a ship is detained to refit, can never be allowed as a charge against the insurer on the ship; and a verdict was accordingly given for the defendant.

*Beillie v.
Moudigiani, B. R.
Hil. 25 Geo.
III.*

In another cause, after a trial at *Guildhall*, a special case was reserved for the opinion of the court, stating, that this was an action upon a policy of insurance on goods at and from *Nevis* to *Bristol*. The ship sailed from *Nevis*; but, before her arrival at *Bristol*, she was captured and taken into *Morlaix*, and there condemned. An appeal was lodged in the parliament of *Paris*, where the sentence was reversed, and the ship and cargo were decreed to be restored. Before the sentence of restitution, the ship and cargo had been sold; but the money was paid, the charges

charges of prosecuting the appeal being deducted. The defendants have paid all the charges of the suit, and the salvage, except the sum now in demand, which was paid by the plaintiffs, as owners of the goods, to the owner of the ship for *freight pro rata itineris*: and for which *freight* this action is brought on the policy on goods.

After time taken to deliberate, Lord *Mansfield* delivered the unanimous opinion of the court for the defendants: the *item* now in litigation, his lordship said, is that which was paid for freight by the owner of the cargo to the proprietor of the ship *pro rata itineris*. The question is, Whether he can charge these underwriters for it? As between the owners of the ship and cargo, in case of a total loss, no freight is due; but as between them no loss is total, where part of the property is saved, and the owner takes it to his own use. In this case, the value of the goods was restored in money, which is the same as the goods; and therefore freight was certainly due *pro rata itineris*. But as between the owners of the goods, and the underwriters upon the cargo, the latter have nothing to do with the freight. The owner of the ship has a lien for his freight; but in a total loss, literally so called, no freight is due. In case of a loss, total in its nature, with salvage, the owner of the goods may either take the part saved, or abandon; but in neither case can he throw the freight upon the underwriters; because they have not engaged to indemnify him against it.

This also was an action on a policy of insurance, which was on the ship and goods from *Stend to Dominique*. The following facts appeared in evidence: that the ship met with bad weather, and was in great distress; that the crew threatened to take the command from the captain unless he would make for the first port; that he then went to *Ferrol* to repair his ship, and by the time the repairs were finished, the crew forsook her; that he then got another crew, and at the moment he was going to sail, the *Spanish* governor stopped him; that after a detention of 37 days she was discharged, and then arrived at *Dominique*. This action was brought for the expence incurred by wages, provisions, &c. during the demurrage at *Ferrol*. On the part of the insurer it was contended, and so held by Mr. Justice *Buller*, who presided upon that trial, that the freight, and not the ship, is lia-

Eden v.
Poole, Sitt.
after Hil.
1785.

C H A P. II. ble for this loss, and that the charge of demurrage could not be allowed upon this policy. The plaintiff was nonsuited.

Robertson,
v. Ewer,
1 Term Re-
ports, p. 127.

Agreeable to the above doctrine, there is a modern decision of the whole court of King's Bench. It was an action on a policy of insurance, on the ship *Dumfries*, at and from *London* to *Africa*, during her stay and trade there, and at and from thence to her port or ports of discharge in the *British West India* islands, to recover a partial loss. The facts were, that this ship, in the course of the war, after performing her voyage to *Africa*, in coming from thence, laden with slaves to the *West Indies*, touched at *Barbadoes* in *December 1781*, for the purpose of watering, at which island an embargo was laid on all ships by order of Lord *Hood*, the commander in chief upon that station; and the vessel was detained a considerable time. The captain applied for leave to depart, but was refused; whereupon he attempted to sail away privately in the night, but was pursued by the *Salamander* sloop of war, and after a slight engagement he was brought back, the *Dumfries* not having sustained any damage, for which the underwriters could be charged, on account of a clause exempting them from partial losses, not amounting to 3 per cent. Lord *Hood*, in consequence of this breach of embargo, upon her return took almost all the men out of the *Dumfries*, dispersed some of the crew among the ships of war: the captain and the rest of the crew were confined; and the ship was detained at *Barbadoes* till the *April* following. This detention, however, was not proved to have arisen solely from the embargo, as it appeared that, for some part of the time, the small-pox prevailed among the slaves, and that the embargo was frequently taken off and renewed between *December* and *April*. The action was brought to recover from the insurer upon the ship the additional wages paid to the seamen, and the charges for provisions during this detention.

Mr. Justice *Buller* was of opinion, at the trial, that the only damages proved, being items for seamen's wages, provisions, and demurrage, during the detention, could not be recovered under this policy on the ship only. To make the underwriter liable there must be a loss of the ship, for the policy is on the body of the ship only; and if she arrive safe at her port of delivery, be the voyage ever so long, you cannot recover under such a policy; if, indeed, she be in such a state as to prevent her

from completing her voyage, it is certainly a loss. The plaintiff was nonsuited.

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In the following term a motion was made to set aside the nonsuit, which, after argument, was refused by the whole court to be done, and upon that occasion Lord *Mansfield* said, "There is no authority to shew, that on this policy the insured can recover for such a loss; but it is contrary to the constant practice. On a policy on a *ship*, sailors' wages or provisions are never allowed in settling the damages. The insurance is on the *body of the ship*, tackle, and furniture; *not on the voyage or crew*. In this case it is admitted, that there was no damage done to the ship, tackle, or furniture; and therefore I think the direction was right, and that the plaintiff ought not to recover."

Mr. Justice *Buller*.—"I take it to be perfectly well settled, that you are not to recover on a policy on the body of the ship for seamen's wages or provisions: these are not the subject of the insurance. The case put at the bar proves the rule. For if the ship had been detained in consequence of any injury which she had received in a storm, though the underwriter must have made good that damage, yet you could not have come upon him for the amount of wages or provisions during the time she was so repairing. Here the ship itself is safe; and the court only look to the thing itself which is the subject of insurance; and the wages and provisions are no part of the thing insured."

The doctrine contained in the preceding cases was much discussed, and by some supposed to be considerably shaken by a decision of the court of King's Bench in the year 1791; where it was unanimously held by the learned judges, that *provisions* sent out in a ship for the use of the crew are protected by a policy of insurance on the *ship and furniture*. In the argument of that case the judges at first thought it fell within the principle of decision in *Robertson v. Ever*, which they were determined to support: but the grounds of distinction between the two decisions are stated with so much clearness and perspicuity, and the effect of usage upon this species of contract so well ascertained, that I feel it my duty not to abridge the arguments adopted by the court.

It

C H A P.

II.

Brough v.
Whitmore,
4 Term Rep.
306.

See ante,
p. 55.

It was an action on a policy of insurance on an *East India* and *China* ship, and on the tackle, ordnance, ammunition, artillery, and *furniture of the ship*. At the trial before Lord Kenyon at *Guildhall*, it appeared that while the ship was lying off *Bank-faul Island* in the river *Canton*, it became necessary to refit her, for which purpose the *stores and provisions* were taken out of her, and put into a warehouse, called a bank faul, and that while they were in the warehouse, they were destroyed by an accidental fire. It was admitted that the policy covered all the articles but the provisions, which were merely for the use of the ship's crew: but if those provisions were not protected by the policy, then there was not an average loss of 3*l.* *per cent.* It was considered in the same light as if the accident had happened on board the ship. For the defendant it was contended, that the provisions were not protected by the insurance; but one of the jury said, it had been determined in Lord *Mansfield's* time, that they were included under the word *furniture*, under which decision the merchants had since acquiesced; on which the plaintiffs obtained a verdict.

A motion, founded upon this objection, was afterwards made to set aside the verdict, and an inquiry was ordered respecting the case alluded to by the juryman; and the argument was fully entered into at the bar.

Lord *Kenyon*, after observing on the loose and ambiguous terms of policies of insurance, said, "The question here arises on the meaning of the word '*furniture*;' one of the jurymen said, and in that he is now confirmed, that according to the understandings of those who enter into these contracts, it includes *the provisions for the use of the crew*. Now, among the several accidents against which the defendant insured, *are perils by fire*; and this ship being at *Canton*, it became necessary to refit her, and to take out all her goods and land them on this island, where the accident happened: by which these provisions, with the rest of the goods, were burned; and there is no doubt but that the loss on this island must be considered in the same light as if it had happened on board the ship itself. This was determined in *Pelly v. The Royal Exchange Assurance Company*. Then if these provisions be insured as part of the out-fit of the ship, and they were consumed by one of the perils insured against, there is an

and of the question; a loss has happened within the meaning of the policy; and consequently the defendant is liable. But it was said in the argument, that the instant any of the provisions were consumed on board, there could not be a total loss; but the short answer to that is, that that comes within the wear and tear of the ship, and it might as well be said that if a mast were a little injured there could not be a total loss. If this decision were to militate against any determination, or even an *obiter dictum*, of Lord Mansfield, I should have hesitated for some time before I delivered my opinion. But the case of *Robertson v. Ewer* is clearly distinguishable from the present; here the goods were consumed by an accident by fire on board the ship, (for the island was for this purpose equivalent to the ship,) and within the meaning of the policy of insurance; but in that case they were consumed by the Negroes during a detention of the ship." C H A P.
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Mr. Justice Ashbursh.—“The case cited is not like the present, for the reason given; and I think that this loss comes within the terms of the policy. It is an undertaking to insure against all accidents which will prevent the provisions being applied to the purpose for which they were intended. These provisions were part of the out-fit; they were consumed by fire, (one of the accidents against which the defendant insured,) and consequently could not be applied to the purpose for which they were put on board.”

Mr. Justice Buller.—“I am clearly of opinion that the underwriters on the body and furniture of the ship are liable to pay the amount of these provisions, which were bought to replace those which were consumed by an accident within the meaning of the policy. Without commenting on the words of the policy, it is sufficient to say, that a policy of assurance has at all times been considered in courts of law as an absurd and incoherent instrument; but it is founded on usage, and must be governed and construed by usage. Now it is perfectly clear that in every instance, where losses have been settled, the provisions put on board the vessel when she sailed, have been considered as part of the ship. The value is taken in this way; the underwriters have a right to go and see the ship, to examine the value of the hull, the masts, and the provisions; the value of the ship alone comprehends all these articles; but though the underwriters have a right to examine the ship itself, in point of fact they do not, because

C H A P. II. cause they know, from experience, the quantity of provisions necessary for the crew for the intended voyage ; and if that value be stated to them in the ordinary way, they sign their names immediately without making further enquiries. Then if the provisions be included in a policy on the ship, and the ship and all the provisions be lost, the underwriters must make good the whole loss, whether it be a valued or an open policy. But it has been said that, if an accident happen after some of the provisions are consumed, the underwriters are entitled to a deduction to the amount of such provisions : I will answer this, first, as the argument applies to a valued, and then to an open policy. As to the first ; from the nature of the policy, the provisions are not insured against all events ; they are only insured against particular risks. Again, there is nothing from which there can be salvage ; if the body of the ship and every thing on board be sunk, or burned, there can be no salvage. And, in the case of an open policy, the insured must prove by evidence what was the value of the whole, and then the same reasons apply as in the case of a valued policy. With respect to the case of *Robertson v. Ewer*, which has been relied on : I thought at first that it applied strongly to the present ; and if I still entertained the same opinion, I would not, on account of any usage to the contrary among underwriters, overturn a solemn determination of this court : but that case, and the two others there mentioned, are clearly distinguishable from the present. In all those the insured wished to charge the underwriters with the amount of the provisions consumed, during the time when the ships were detained. Of those therefore it is sufficient to say, that an insurance is on the ship for the voyage : but, during a detention, the ship is not proceeding ; and therefore the underwriters are not liable. This case also differs from that of *Robertson v. Ewer* in another circumstance ; there the provisions were consumed by the slaves on board, and not by the ship's crew, and the slaves are considered as part of the cargo. The words of Lord Mansfield in that case must be taken with a reference to the case then before him. He was then speaking of a charge for provisions used during the detention of the ship, and for the maintenance of the slaves ; and he said, " there is no authority to shew that, on this policy, the insured can recover for such a loss : but it is contrary to the constant practice." Then he proceeded to say, on a policy on a ship, sailors' wages or provisions are never allowed in settling the damages. Now, even if those latter words be taken in their

their general sense, and not confined to the case immediately before the court, they are accurate; for "provisions" *eo nomine* are not taken into consideration. In general, the captain of a ship takes on board provisions sufficient for the voyage; and if he be detained in any port, and he be a prudent man, he will not use what are called the ship's stores during his detention, but he will buy others for immediate consumption, during the detention, because he cannot but know that he has the same length of voyage to perform that he had before he was detained: it makes no difference however to the underwriters whether he do so or not; for if the captain be obliged to purchase other stores for the remainder of the voyage, the underwriters are not answerable for these, but only for those which were on board at the time of the insurance, since they only formed a part of the value of the ship. On the whole, therefore, I am of opinion, that there should be no new trial. The cases cited are distinguishable from the present: the usage of merchants, as to the construction of these instruments, stands unimpeached; and therefore it must prevail in this case."

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Mr. Justice Grose agreed, and the rule was discharged.

In an insurance upon a *Greenland ship*, it became a question, Whether the *lines and tackle* employed in the fishery in those seas could be recovered under a policy made upon *the ship, tackle, and furniture, &c.* This case came before the court, upon a motion for a new trial, and the judges were unanimously of opinion, that they were not protected by the policy, not being part of the *ship's tackle or furniture.*

Hofkins v.
Pickersgill,
B. R. East.
3 Geo. III.

It is also necessary, in order to entitle the insured to recover, that the loss which has happened be a direct and immediate consequence of the peril insured, and not a remote one. This doctrine was laid down in a case before Lord Mansfield, and the decision of the jury was agreeable to the principle stated by the Chief Justice.

It was an action on a policy of insurance "at and from *Brist-
" tol to the coast of Africa*, during her stay and trade there,
" and from thence to her port or ports of discharge in the *West*

Jones v.
Schmoll,
Guildhall,
Tr. Vac.
1785, 1 T.
Rep. p. 130.
Note (a).
and Pull. 388.

See also *Hedkisson v. Robinson*. Chap. on Abandonment; and 3 Bos. and Pull. 388.
" *Indies.*"

CHAP. "Indies." There was a memorandum on the policy, "that
 II. " the assurers are not to pay any loss that may happen in boats
 " during the voyage, (mortality by natural death excepted,) and
 " not to pay for mortality by mutiny, unless the same amount
 " to 10*l.* *per cent.* to be computed on the first cost of the ship,
 " out-fit, and cargo, valuing negroes so lost at 35*l.* *per head.*"
 The demand upon the policy was the loss of a great many slaves
 by mutiny. The evidence of the captain was, that he had ship-
 ped 225 prime slaves on board: that on the 3d of *May*, before
 he sailed from the coast of *Africa*, an insurrection was attempted;
 that the women seized him on the quarter deck, and endea-
 voured to throw him overboard, but he was rescued by the
 crew; that the women and some men threw themselves down
 the hatchway, and were much bruised. That he sent the ring-
 leader on shore, and twelve men and a woman afterwards died
 of those bruises, and from abstinence: that on the 22d of *May*
 there was a general insurrection, the crew were forced to fire
 upon the slaves, and attack them with weapons, it being a case
 of imminent necessity. Several slaves took to the ship's sides,
 and hung down in the water by the chains and ropes, some for
 about a quarter of an hour, three were killed by firing, and
 three were drowned, the rest were taken in, but they were too
 far gone to be recovered; many of them were desperately bruised,
 many died in consequence of the wounds they had received from
 the firing during the mutiny, some from swallowing salt water,
 some from chagrin at their disappointment, and from abstinence;
 several of fluxes and fevers; in all to the amount of 55. The
 underwriter had paid at the rate of 15 *per cent.* for 19, who
 were either killed during the mutiny, or had afterwards died of
 their wounds. Another consequential damage was stated, that
 the mutiny had lessened the remaining slaves in the estimation of
 the planters, and reduced their price.

Lord *Mansfield* said, "As to the latter loss, I think the un-
 derwriter is not answerable for the loss of the market, or the
 price of it: that is a remote consequence, and not within any
 peril insured against by the policy."

"The question for the jury will be, Whether any of those
 who died by any other means, except by being fired upon, or
 in consequence of the wounds and bruises which they received
 during

during the struggle, are within the meaning of the policy which insures against damage by mutiny? This policy is in the common form, and if it were not for the memorandum, I should say, the case was not within the instrument. But as it now stands it is very clear, that those who were killed by the firing, or died in consequence of their wounds, are within the policy; the other complicated cases must be left to the jury. The first class, such as were killed in the fray, certainly come within the meaning of the policy; and the second class also, those who died of the wounds they received. The third class are, I think, as clearly not within it, such as being baffled in their attempts, in despair chose a mode of death, by fasting, or died through despondency: that is not mortality by mutiny, but the reverse, for it is by *failure of mutiny*. The great class are such as received some hurt by the mutiny, but not mortal, and died afterwards of other causes, as those who swallowed water, jumped overboard, &c. This is the great point."

The jury found, that all who were killed in the mutiny, or died of their wounds, were to be paid for. That all those who died of their bruises, which they received in the mutiny, though accompanied with other causes were to be paid for. That all who had swallowed salt water, and died in consequence thereof, or who leaped into the sea, and hung upon the sides of the ship, without being otherwise bruised, or who died of chagrin, were not to be paid for.

In the construction of policies of insurance for time (a), which are very frequent, the same liberality, equity, and good sense, have always prevailed, as in all other insurances: and the courts have gone, as far as possible, to decide according to the intention of the parties.

In an action on a policy of insurance on the ship *Mary*, a letter of marque, the words of the policy were, "at and from *Liverpool to Antigua, with liberty to cruise six weeks, and to return to Ireland, or Falmouth, or Milford, with any prize or*

Syres and
others v.
Bridge,
Doug. 509.

(a) By the act of 35 Geo. III. c. 63. s. 12. no policy upon any ship, or interest therein, shall be made for any longer term than twelve calendar months. See ante, p. 37.

"prizes."

C H A P. II. " prizes." The ship having been taken, this action was brought, and came on to be tried before Mr. Baron *Hotham* at *Lancaster*, when a verdict was found for the plaintiffs.

Upon a motion for a new trial, the material parts of the evidence were, that the policy was made on the 9th of *February* 1779, and there was no time fixed in it for the commencement, or the duration of the voyage. The captain of the ship, being called on the part of the plaintiffs, swore that he in fact sailed from *Liverpool* on the 28th of *February*; he was five days before he cleared the land; and he proceeded on his direct voyage till the 14th of *March*, chasing, however, at different times, from the 7th to the 14th, at which time he began his cruise, giving notice thereof to the crew, and ordering a minute of it to be entered in the log-book, which was done. From the 14th of *March*, he continued cruising about the same latitude till the 17th or 18th of *April*: when he discontinued the cruise, of which he also gave notice, intending to go to the *Burlings*, off *Lisbon*, in the course of his voyage. On the 23d he renewed the cruise, of which he gave notice as before, and ordered a minute, to that purpose, to be entered in the log-book. From that time he continued cruising till the 28th of *April*, when he was taken by an *American* privateer. Many witnesses were examined; some of whom thought, that the liberty of cruising given by the policy, meant six successive weeks; others conceived, that if the separate times of cruising, when added together, should not exceed the space of six weeks, the terms of the insurance would be complied with: but none of them could prove any usage, as none of the witnesses ever knew a case exactly circumstanced like the present.

Lord *Mansfield*—" This was merely a question of construction, on the face of the policy, and unless a usage could have been shewn in favour of this desultory cruising, calling witnesses to support it, was calling them to swear to mere opinion. None of those produced knew of any instance; and therefore, their evidence ought not to have been received. Yet, I dare say, their testimony had great weight with the jury. The meaning of words depends upon the subject. The instructions were not read, but they shew the meaning very clearly, for they run thus:

thus: "To cruise six weeks, and *then* proceed to *Antigua*." CHAP. II. There can be no general rule. Here the subject matter, in my opinion, is decisive to shew, that the six weeks meant one continued period of time. A cruise is a well known expression for a connected portion of time. There are frequently articles for a month's cruise, a six weeks' cruise, &c. Such a liberty, as in this case, to a letter of marque, is an excuse for a deviation. But what was contended for by the plaintiffs is impossible in practice. Suppose the ship returns *directly back*, cruising for the space of a week. She may then perhaps take three weeks to return to where she had been. Can she then renew the cruise, return again, and so repeatedly? The voyage, in that way, might last for years. But the true meaning is, "I will excuse a deviation for six weeks." The instructions, although it happens they were not read, strike me much. Another argument: Six weeks is a continuation, a congregate denomination of time. If they had meant separate days, they would have said forty-two days." The rule for a new trial was made absolute.

Having said thus much of construction in general, by which it appears, that the material rules to be adhered to, are the intention of the parties entering into the contract, and the usage of trade; it will be proper to consider more particularly, what shall be construed a loss within the meaning of the policy. This mode of treating the subject naturally leads us to consider losses by perils of the sea; losses by capture, and by detention of prince, or people; and losses by the barratry of the masters or mariners; which are the great divisions of perils insured, and which will furnish materials for the three following chapters.

CHAPTER THE THIRD.

Of Losses by Perils of the Sea.

CHAPTER.
III.1 Shower,
323.
R. & C.,
Nov. 64.Green v.
Fimble,
Peake, 212.1 Mag. 52.
76.Hodgson v.
Malcolm,
2 New Rep.
336.

THE subject matter of this chapter may be reduced to a very small compass; as very few questions have ever been agitated in the *English* courts of law upon this point. It may, in general, be said, that every thing which happens to a ship, in the course of her voyage, by the immediate act of God, without the intervention of human agency, is a peril of the sea. Thus in an insurance against perils of the sea, every accident happening by the violence of wind or waves, by thunder and lightning, by driving against rocks, by the stranding of the ship, or by any other violence which human prudence could not foresee, nor human strength resist, may be considered as a loss within the meaning of such a policy; and the insurer must answer for all damages sustained, in consequence of such accident. But if a ship be driven by stress of weather on an enemy's coast, and is there captured, it is a loss by capture, and not by perils of the sea. This was ruled by Lord *Kenyon* in an action on a policy against capture only, and the ship was driven by a hard gale of wind on the coast of *France*, and was there captured, but she did not receive any damage by the wind. Lord *Kenyon* said, this was clearly a loss by capture, for had she been driven on any other coast than that of an enemy, she would have been in perfect safety. The plaintiff had a verdict (a).

In cases where the loss is not total, but only partial, arising from a leak, from the stranding of the ship, or from the loss of

(a) In moving a ship from one part of a harbour to another, it became necessary to send two of the crew on shore to make fast a new line, and to cast off a rope, by which the ship was made fast, those two men being immediately impressed and carried away, and not being allowed by the press-gang to cast off the rope in question, the ship in consequence thereof went ashore, and was lost. Mr. Justice *Heath*, Mr. Justice *Ross*, and Mr. Justice *Chambre*, held this to be a loss by perils of the sea within the policy, contrary to the opinion of Lord Chief Justice *Mansfield*.

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her masts, cables, or rigging, the insurers upon the cargo are liable to restore the value of all the damaged goods, and the underwriter upon the ship is also answerable for all the injury which she has sustained.

C H A P.
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In charter parties, if the vessel freighted was robbed or taken by pirates, that was held to be a loss within the meaning of the words "perils of the sea." It is also said, that the same rule of construction prevails as to policies of insurance. That possibly might, and would be the true construction upon those words; but as it is now the universal custom to insure against the attacks of pirates, by express words inserted in the policy, that question can now hardly arise.

2 Roll. Abr.
248. pl. 80.
Comber-
batch, 56.

Although the courts in this case, as in all others, will endeavour to give effect to this species of contract, by a liberal and equitable construction; yet they will be cautious not to extend the principle so far, as to say, that the acts of the parties shall be made to operate beyond their intention; and therefore they will attend to the words of the contract, and see that the loss, which is proved to have happened, is really one of those risks against which the underwriter has insured.

An action was brought upon a policy of insurance for the value of certain slaves, insured by that policy. The declaration stated; "that by perils of the sea, contrary winds, currents, and "other misfortunes, the voyage was so much retarded, that a "sufficient quantity of water did not remain for the support of "the slaves, and other people on board, and that certain of the "slaves, mentioned in the declaration, perished for want of "water." The facts, appearing in evidence, were, that the ship, being bound from *Guinea* to *Jamaica*, had missed the island, and the crew were reduced to great distress for want of water: that the captain consulted with the crew, and it was unanimously agreed upon that some of the slaves should be thrown overboard, in order to preserve the rest: that at the time this resolution was formed, there remained but one day's full allowance of water, at two quarts *per* man. The jury, upon this evidence, found a verdict for the plaintiff, with damages at 30*l.* a head for every slave thrown overboard.

Gregson v.
Gilbert,
B. R. Easter,
23 Geo. III.

C H A P.
III.

A motion was afterwards made for a new trial, upon the ground, that this was not a loss by perils of the sea.

Lord Mansfield.—“ This is a very uncommon case, and deserves a further consideration. There is great weight in the objection, that the loss is stated, by the declaration, to have arisen from the perils of the sea, and that the currents, &c. had made the ship foul and leaky. Now does it appear by evidence, that the ship was foul and leaky? On the contrary, the loss happened by mistaking *Jamaica* for another place. Besides, a fact has been mentioned by the counsel of throwing some overboard after the rain fell, a fact, which is not agreed on by both sides, though a very material one.”

Mr. Justice Buller.—“ The declaration does not, in any part of it, state the loss, which has been the occasion of this demand; and it would be very mischievous, if we were to overturn this objection. Suppose, for a moment, that the underwriters, in some cases, are liable for the mistake of the captain, yet, if they are not liable in others, the nature of the loss must be stated in the declaration, that the defendant may have an opportunity of moving in arrest of judgment, if it be not sufficiently alleged. But it would be impossible for the defendant in this case to move in arrest of judgment: for the facts of the case, as proved, are different from those stated in the declaration. The point of law in arrest of judgment can only be argued from the facts stated on record; and the declaration in this case states the loss of the plaintiff to have happened by perils of the sea.” The rule for a new trial was made absolute, on payment of costs.

Tatham v.
Hodgson,
6 Term
Rep. 656.

So in a more modern case, in an insurance upon slaves against *perils of the sea*, their death by failure of sufficient and suitable provision, though that failure was occasioned by extraordinary delay in the voyage from bad and stormy weather, was holden not to be a loss within the policy by perils of the sea, but a loss by natural death, which cannot now be insured against since the statutes for regulating the manner of carrying slaves in *British* vessels from the coast of *Africa*, by which it is provided that no loss or damage shall be recoverable on a policy on account of the mortality of slaves by natural death or ill treatment,

30 Geo. III.
c. 12. s. 8.
24 Geo. III.
c. 80.

ment, or against loss by throwing overboard of slaves on any account whatsoever, &c. C H A P. III.

In an action on a policy of insurance at and from *Saint Bartholomew* to the coast of *Africa*, and during her stay and trade there and back to *Saint Bartholomew*, it was attempted, under a count for a loss by *perils of the sea*, to recover for a total loss of the ship, which appeared to have been destroyed by a species of worms which infest the rivers of *Africa*. An intelligent merchant swore, that he had known many instances of this species of loss, but that the underwriters had invariably refused to pay. Lord *Kenyon*, upon this evidence, and the unanimous declaration of the jury, decided that it was not a loss by perils of the sea.

39 Geo. III. c. 80. s. 24.

Rohl v Parr, Guildhall, Sitt. after Hil. 1796.

If a ship has been missing, and no intelligence received of her within a reasonable time after she failed, it shall be presumed that she has foundered at sea.

The ship *Charming Peggy* was insured in 1739, from *North Carolina* to *London*, with a warranty against captures and seizures, and in an action the loss was laid in the declaration to be by sinking at sea. All the evidence given was, that she sailed out of port on her intended voyage, and had never since been heard of. Several witnesses proved, that in such a case, the presumption is, that she perished at sea, all other sorts of losses being generally heard of. It was insisted for the defendant, that as captures and seizures were excepted, it lay upon the plaintiff to prove, that the loss happened in the particular manner declared on. But Lord Chief Justice *Lee* said, it would be unreasonable to expect certain evidence of such a loss, where every body on board is presumed to be drowned: and all that can be required is the best proof the nature of the case admits of, which the plaintiff has given. He therefore left it to the jury, who found according to the plaintiff's declaration.

Green v. Brown, 2 Stra. 1199.

The same doctrine was held in a more modern case before Lord *Mansfield*. It was an action of covenant on a deed, in the nature of a policy of insurance, by which the defendant was

Newby v. Read, Sittings after Michaelmas 3 Geo. III.

C H A P.
III.

bound to insure against any loss happening before the 30th of November 1762, free from average. The ship sailed from *New-castle* to *Copenhagen*, which is usually about ten days voyage. She was soon after taken by a *French* privateer, but ransomed; and she then proceeded on her voyage to *Copenhagen* (as was proved by the ransomers) in a bad condition. She was never heard of afterwards, though all due diligence had been used; and several ships, which sailed after her, were proved to have arrived safe at *Copenhagen*.

Lord *Mansfield* told the jury, that this evidence was a sufficient ground to presume that she perished at sea, unless the contrary appeared. The jury accordingly found for the plaintiffs.

I have not been able to find any regulation in the law of *England*, or the usage of merchants fixing a limited time, within which the assured may demand payment for his loss, in case no accounts arrive of the ship upon which insurance is made. Indeed, from the nature of the thing, what shall be a reasonable time in such cases, must always depend upon a variety of obvious circumstances. I understand, however, a practice has prevailed among insurers, which seems reasonable enough, that a ship shall be deemed lost if not heard of in six months after her departure (or after the time of the last intelligence from her) for any part of *Europe*; and in twelve months, if for a greater distance. The only objection to such a practice is, that the latter period does not seem sufficient in *India* voyages. However, that is a matter for the insurer's consideration; and even if he should pay the money under a mistake, supposing the ship lost when it really is not, he might, as we shall see hereafter, if the insured were unwilling to refund, recover it back, in an action for money had and received to his use.

Salk. 28.

Vide post.
c. 20.

In *Spain* and *France*, this matter, however, is not left to uncertainty; but the time, within which such losses may be demanded, is fixed and ascertained by express regulations. By the ordinances of the former, if any ship insured on going to, or coming from the *Indies*, is not heard of in a year and a half after

Mogens 33.

after her departure from the port where she loaded, it is declared that she is, and shall be deemed lost : by those of the latter it is said, that if the insured receive no news of his ship, he may, at the expiration of a year for common voyages, reckoning from the day of the departure, and after two years for those at a greater distance, make his cession to the underwriters, and demand payment, without being obliged to produce any certificate of the loss.

CHAP.
III.

a Magens
177. Ord.
of Lewis
XIV. l. 31.
art. 58.

CHAPTER THE FOURTH,

Of Losses by Capture and Detention of Princes,

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CAPTURE, as applied to the subject of marine insurances, may be said to be a taking of the ships or goods belonging to the subjects of one country by those of another, when in a state of public war. What shall be considered as a capture, so as to render an insurer liable under a policy insuring against captures, has now become a question of very little difficulty.

^a Burr. 694.
1st point in
Goss v. Wi-
thers.

The law upon this subject is perfectly settled in *England* between the insurer and the insured; and it is this, that the ship is to be considered as lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy; and the insurer must pay the value. If, after a condemnation, the owner recover or retake her, the insurer can be in no other condition than if she had been retaken or recovered before condemnation. The insurer runs the risk of the insured, and undertakes to indemnify; he must therefore bear the loss actually sustained, and can be liable to no more. So that if, after condemnation, the owner recovers the ship in her complete condition, but has paid salvage, or been at any expence in getting her back, the insurer must pay the loss so actually sustained. No

^a Burr. 696.

^a 9 Geo. II.
c. 34. s. 24.
31 Geo. III.
c. 66. s. 42.

capture by the enemy can be so total a loss as to leave no possibility of recovery. If the owner himself should retake at any time, he will be entitled; and by late acts of parliament, if an *English* ship retake the vessel captured, either before or after condemnation, the owner is entitled to restitution upon stated salvage. This chance does not, however, suspend the demand for a total loss upon the insurer: but justice is done by putting him in the place of the insured, in case of a recapture.

These principles, which are agreeable to the ideas of foreign writers, were settled by Lord *Mansfield*, and the whole court of King's

King's Bench, in *Goss* against *Withers*, (which will be cited at length when we come to treat of abandonment,) and which have never since been disputed. It has likewise been held, that where a capture has been made, whether it be legal or not, the insurers are liable for the charges of a compromise made *bond fide*, to prevent the ship from being condemned as prize. It is true, the only case I have been able to find where this point came directly in question is a *nisi prius* note; but when we consider the high authority from which this doctrine is taken, and that the thing in itself is not at all repugnant to the general principles of the law of insurance, it certainly has a claim to our attention.

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Rocci Sa-
lecta re-
sponsa,
Resp. 34.

2 Burr. 683.

It was an action on a policy of insurance on a *Dutch* ship, called the *Tyd*, and its cargo, at and from *Saint Eustatius* to *Amsterdam*, warranted a *Dutch* ship, and the goods *Dutch* property, and not laden in any *French* port in the *West Indies*. The cargo was worth 12,000*l.* and was insured at a premium of fifteen guineas *per cent.* which was advanced to this high rate on account of the number of captures made by the *English* of neutral vessels, on suspicion of illicit trade, and the detention of those vessels by the proceedings in the courts of admiralty. The defendant underwrote 82*l.* of the plaintiff's, for a premium of 12*l.* 18*s.* 3*d.* In *May* 1758, the ship was at *Saint Eustatius* taking in her cargo, which consisted of sugar and indigo, and other *French* commodities, which were put on board her, partly out of barks from sea, partly from the shore of the island. On the 18th of *June* 1758, she sailed on her voyage; on the 27th she was taken by an *English* privateer and carried into *Portsmouth*. On the 1st of *August* the sailors were examined upon the standing interrogatories prescribed by the statute 29 *Geo. II. c. 34.* and the captain entered his claim in the Admiralty court. In *October* 1758, the claimants were cited to specify what part of the goods was taken from the shore of *Saint Eustatius*, and what from the barks. Citation was continued from court to court till *February* 1759, when an interlocutory decree was pronounced for the contumacy of the claimants in not specifying, and that therefore the goods should be presumed *French* property. There was an appeal to the lords commissioners of prizes: but as many causes stood before it, as the market was very high, and as the cargo was in part perishable, the agent of the owners agreed

Berens v.
Rucker,
1 Black.
313.

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agreed with the captors to give them 800*l.* and costs, to obtain the reversal of the sentence. The reversal was had by consent, and, in order to give costs to the captor, it was decreed by consent, that there was a sufficient cause for seizure; and thereupon costs were decreed to the captors, and restitution of the cargo to the owners was also ordered. The ship, when restored, proceeded to *Amsterdam*; and after her arrival there, the Chamber of Insurances in that city settled the average of the plaintiff towards the loss and expences at 14*l.* 3*s.* 8*d.* occasioned by the capture, detention, and litigation; and for this sum the action was brought.

Lord *Mansfield*.—"The first question is, Whether this was a just capture? Both sentences are out of the case, being done and undone by consent. The capture was certainly unjust. The pretence was, that part of this cargo was put on board off *Saint Eustatius*, out of barks supposed to come from the *French* islands, and not loaded immediately from the shore. This is now a settled point by the Lords of Appeal, to be the same thing as if they had been landed on the *Dutch* shore, and then put on board afterwards; in which case there is no colour for seizure. The rule is, that if a neutral ship trade to a *French* colony, with all the privileges of a *French* ship, and is thus adopted and naturalized, it must be looked upon as a *French* ship, and is liable to be taken. Not so, if she have only *French* produce on board, without taking it in at a *French* port; for it may be purchased of neutrals.

"Second question is, Whether the owners have acted *bonâ fide* and uprightly, as men acting for themselves, and upon a reasonable footing; so as to make the expences of this compromise a loss to be borne by the insurers. The order of the judge of the Admiralty to specify was illegal, contrary to the marine law and the act of parliament, which is only declaratory of the marine law; because if they had specified, it could be of no consequence, according to the rule I before mentioned. The captors were, however, in possession of a sentence, though an unjust one: and a court of appeal cannot, or seldom does, upon a reversal, give costs or damages, which have accrued subsequent to the original sentence; for these damages arise from the fault of

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of the judge, not of the parties. Under all these circumstances, therefore, the owners did wisely to offer a compromise. The cargo was worth 12,000*l.* the appeal was hazardous; the delay certain. The *Dutch* deputy in *England* negotiated the compromise; the Chamber of Commerce at *Amsterdam* ratified it, and thought it reasonable. Had the whole sentence been totally reversed, the costs must have sat heavy on the owners. I therefore think the insurers liable to answer this average loss, which was submitted to in order to avoid a total one." The jury found for the plaintiff, agreeably to the above direction (a).

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By the positive provisions of two acts of parliament, 22nd Geo. III. c. 25. and 33 Geo. III. c. 66. s. 37, 38, and 39, it is declared illegal for the captains or owners of any *British* ships who are captured, to ransom themselves from the enemy, and the contract to ransom is not only declared absolutely void, but the parties entering into them are punished by fine. And by a still later act, 43 Geo. III. c. 160. s. 34, 35, and 36. the above provisions are continued: and by the 32^d sect. if any captain of a privateer shall agree to ransom any ship, or cargo taken as prize, and shall in pursuance of such agreement set the prize at liberty, instead of bringing the same into the ports of His Majesty's dominions, unless in a case of extreme necessity to be allowed by the court of Admiralty, he shall forfeit his letter of marque, and shall suffer such penalties of fine and imprisonment, as the said court shall adjudge. It would follow as a necessary consequence, that no sum paid on such account could be recovered from the underwriters.

Upon this principle the following decision has taken place: The ship *Themis* was insured for 12 months, and during that period was captured and carried into *Bergen* in *Norway*, and there condemned by the *French* consul. After this sentence, the ship was put up to publick auction at *Bergen*, by the public officer of the court of *Denmark*, having been previously advertised, and was re-purchased by the agent of the plaintiff; and for this repurchase money the plaintiff insisted, (if not entitled to recover as for a total loss,) he was at all events entitled to a verdict.

Navelock v.
Rockwood,
8 Term Rep
558.
See S. C.
post. ch. 9.
and 18, on
another
point.

(a) In *Tylen v. Gorney*, 3 Term Rep. 477. this case was quoted without contradiction; and the point, in support of which it was adduced, was held accordingly.

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As to the
discussion of
this point,
see post.
ph. 18.

The court after hearing two arguments, were unanimously of opinion, that as the sentence of the *French* consul in a neutral country was contrary to the law of nations, and void, the property never was develt out of the original owner; and that therefore the money paid for the repurchase was in the nature of a ransom. The ransom acts are remedial laws, and in the construction of such acts, it is the rule to extend the remedy so as to meet the mischief; and the legislature intended to prevent such a transaction as the present taking place, because it would take away the chance of recapture. The circumstances of this being done by an agent, at an auction, and on land, were deemed immaterial, the acts of parliament not having described at what places, or in what form a ransom is prohibited, but having prohibited ransom in general terms, the case was thought to come within the mischiefs against which those statutes were meant to guard.

But though the law upon the subject of capture in insurances is so clearly defined, that at this day it seems almost impossible to raise a question, yet it formerly occasioned much doubt and litigation, what effect a recapture might have upon this kind of contract; and how long it was necessary for goods to remain in the hands of the enemy, in order to develt the original proprietor of his property in case of a recapture,

All these doubts are now entirely removed, and can never again be agitated in this country, between an insurer and insured: Lord Mansfield, for himself and his brethren, having declared, in giving judgment in *Goss v. Withers*, that these questions could never have been started in policies upon real interest, because, as we have seen, they never could have varied the case. But wager policies gave rise to them; for it was necessary to set up a total loss, as between third persons, for the purpose of their wager, though in fact the ship was safe, and restored to the owner. His Lordship laid down the same doctrine in *Hamilton v. Mendes*: the consequence of which is, that as wager policies are now expressly prohibited by statute, these questions can never arise upon a policy of insurance.

2 Burr. 695.

Wide beginning of this chap.

2 Burr. 1108.
19 Geo. II.
c. 37.

2 Burr. 693.

The only two possible cases in which they can be material are: 1st, Between the owner and a neutral person who has bought

bought the capture from the enemy; and, 2dly, Between the owner and recaptor: But whatever rule ought to be followed in favour of the owner, against a recaptor or vendee, it can no way affect the insurance between the insurer and insured.

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Notwithstanding this point is now, as far as relates to our present enquiry, no longer a subject of uncertainty, it cannot but afford pleasure to the mind, and, I trust, it will not be considered as impertinent, to trace the opinion of foreign writers upon this question, and to state briefly several cases which have been decided in our courts of law here, upon capture and recapture, previous to the statute of 19 Geo. II.

It seems to be generally agreed by foreign writers, that it is not every taking and subsequent possession under that taking, which will constitute a capture in the legal sense of the word, or make it become the property of the captor; but that there must be a firm possession. In this they all agree; but what shall be such a possession, as to vest the absolute property in the captor, is so much a matter of doubt, that it is difficult to find two writers of the same opinion. Upon this subject various lines have been drawn by arbitrary rules, partly from policy, to prevent too easy dispositions to neutrals; and partly from equity to extend the *jus postliminii* in favour of the owner. And it is not to be wondered at, that there is so great an uncertainty and variety of notions amongst the writers on this subject, about fixing a positive boundary by the mere force of reason, where the subject matter is arbitrary, and not the object of reason alone.

2 Bur. 695.

Grotius is of opinion, that the captor shall be said to have the property in him as soon as the former owner shall have lost the hope of recovery and the ability to pursue, and that property shall then be said to be *taken*, when it is brought within the enemy's fortrefs. Whence it follows as a consequence, that in marine captures, the capture shall be deemed complete when the ships or goods taken shall be brought within the harbour or ports of the enemy, or to that place where their whole fleet is stationed; for then the recovery may be despaired of. But by a more recent law introduced among the *European* nations, it seems, that that only is deemed a capture which has been twenty-four

*Grotius de
jure belli,
lib. 3. c. 6,
l. 3.*

C H A P. IV. hours in the possession of the captor. The former part of this opinion, I find, was adopted in a case in *March's Reports*, where it is said, that the property is not altered unless it be brought *infra presidia* of the enemy: and some nations have made twenty-four hours quiet possession by the enemy the criterion of their judgment. Thus by the ordinances of *Lewis* the fourteenth it is declared, that if any of the ships of *French* subjects be retaken from their enemies, after having been twenty-four hours in their hands they should be good prize: and if it be before twenty-four hours, they shall be restored to the owners, with all that is in them, and one third shall be given to the ship that retakes them. *Bynkershoek*, however, states the opinion of *Grotius*, controverts it with much ability, and seems to think, that the *spes recuperandi* is the ground on which the question is to be decided. He mentions the opinion of some writers, who think, that it is necessary for the ship to have arrived in the enemy's port, to have been condemned, to have sailed out again, and arrived in a friend's port, before the property can be said to be changed. *Roccus* rather states the various opinions of others than asserts one of his own; but he seems to lean to the idea, that it is necessary to bring the ship within the confines of the captor, and to keep it there a night in safe custody. But, as was said by Lord *Mansfield*, all these circumstances are very arbitrary, and therefore are generally exploded.

a Burr. 694. By the marine law of *England*, as practised in the court of Admiralty previous to the passing of any act of parliament, which commanded restitution, or fixed the rate of salvage, it was held, that the property was not changed so as to bar the owner in favour of a vendee or recaptor, till there had been a sentence of condemnation. Agreeably to this principle, judgment was given in that court, decreeing restitution of a ship retaken by a privateer, though she had been fourteen weeks in the enemy's possession. Another case also, upon the same principle, was decided against the vendee after a long possession, two sales, and several voyages.

Thus stands the marine law of *England*, by which it appears, that the *jus postliminii* continues till condemnation, which, by the acts of parliament about to be quoted, is extended; and now continues for ever.

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By the statutes of the 13th *Geo.* II. c. 4 and 29th *Geo.* II. c. 34. ships or vessels of his Majesty's subjects, which had been captured by the enemy, and were retaken, either by men of war or privateers, were decreed to be restored to the original owners, upon paying for salvage the sums mentioned in the statutes, and the quantum of salvage to be paid to privateers was made to depend upon the length of time which the recaptured vessel had been in the enemy's hands; such salvage, however, never being allowed to exceed a moiety of the value.

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By the last prize acts this distinction is abolished, and the rate of salvage payable in all cases is fixed to one eighth of the value, if the recapture is made by any of his Majesty's ships, and to one sixth, if by a privateer or other ship.

33 Geo. III.
c. 66. s. 42.
& 41 G. III.
c. 160.
s. 39.

The words are, "that if any ship or vessel, or boat taken as prize, or any goods therein, shall appear and be proved, in any court of Admiralty having a right to take cognizance thereof, to have belonged to any of his majesty's subjects of *Great Britain or Ireland*, or any of the dominions and territories remaining and continuing under his majesty's protection and obedience, which were before taken or surprized by any of his majesty's enemies, and at any time afterwards again surprized and retaken by any of his majesty's ships of war, or any privateer, or other ship, vessel, or boat, under his majesty's protection and obedience, that then such ships, vessels, boats, and goods, and every such part and parts thereof as aforesaid, formerly belonging to such his majesty's subjects, shall in all cases (save in such as are hereafter excepted) be adjudged to be restored, and shall be, by decree of the said court of admiralty, accordingly restored to such former owner or owners, or proprietors, he or they paying for and in lieu of salvage (if retaken by any of his Majesty's ships) one eighth part of the true value of the ships, vessels, boats, and goods, respectively, so to be restored, which said salvage of one eighth shall be answered and paid to the flag officers, captains, officers, seamen, marines, and soldiers, in his majesty's said ship or ships of war, to be divided in such manner as before in this act is directed touching the share of prizes belonging to the flag officers, captains, officers, seamen, marines, and soldiers, where prizes are taken by any of his majesty's ships of

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“ war : and if retaken by any privateer, or other ship, vessel, or
 “ boat, one sixth part of the true value of the said ships, vessels,
 “ boats, and goods ; all which payments to be made to the
 “ owner or owners, officers, and seamen of such privateer, or
 “ other ship, vessel, or boat, shall be without any deductions,
 “ and shall be divided in such manner and proportions as shall
 “ have been agreed on by them as aforesaid ; and in case such
 “ ship, vessel, or goods, shall have been retaken by the joint
 “ operation or means of one or more of his majesty’s ships, and
 “ one or more private ship or ships, then the judge of the High
 “ Court of Admiralty, or other court having cognizance thereof,
 “ shall order and adjudge such salvage to be paid to the recap-
 “ tors, by the owner or owners of such retaken ship, vessel, or
 “ goods, as he shall, under the circumstances of the case, deem
 “ fit and reasonable, which salvage so to be adjudged shall be
 “ accordingly paid by the owners of such retaken ship, vessel,
 “ or goods, to the agents of the recaptors, in such proportions
 “ as the said court shall adjudge ; but if such ship or vessel so
 “ retaken shall appear to have been, after the taking by his ma-
 “ jesty’s enemies, by them set forth as a ship or vessel of war,
 “ the said ship or vessel shall not be restored to the former
 “ owners or proprietors, but shall in all cases, whether retaken
 “ by any of his majesty’s ships, or by any privateer, be adjudged
 “ lawful prize for the benefit of the captors.”

From hence it is clear, that by the marine law received and practised in *England*, there is no change of property, in case of a capture, before condemnation ; and that now, by the acts of parliament just referred to, in case of a recapture, the *jus post-liminii* continues for ever, unless the ship so retaken shall appear to have been set forth by his majesty’s enemies as a ship of war, in which case she shall be deemed good prize to the recaptors. However, as has been already said, the change of property is not at all material as between the insurer and the insured, upon policies of real interest, which are the only policies that can now by law be effected.

I proceed then to state the cases which were determined upon this point, on wager policies, previous to the act of parliament prohibiting such insurances.

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The first case is one in the 10th year of Queen *Anne's* reign, in which the facts upon a special verdict appeared to be, that the plaintiff had insured a certain sum of money upon a ship, called the *Ruth*, in a certain voyage, *in which ship the plaintiff was found not to be at all interested.* It happened that this ship was taken by the enemy, and kept in their possession for nine days, and then before it was carried *infra presidia*, it was retaken by an *English* man of war. Upon these facts, the question was, Whether or not this was such a taking as should enable the plaintiff to recover the sum insured against the defendant?

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Affieudo v.
Cambridge,
20 Mod. 77.

After argument, the court seemed to think (but a second argument was ordered, which does not appear from any reporter ever to have been made), that the defendant was entitled to judgment.

Upon this case Lord *Mansfield* has observed, that the man of war which retook the ship, brought her into the port of *London*, and restored her to the owner upon reasonable redemption; that this appears from the special verdict, although it is not stated in the printed case; and then, as the owner did not abandon the ship, he could only have come upon the insurers for the redemption; and no question could have arisen upon the change of property. Besides, the policy being interest or no interest, without benefit of salvage, the question arose upon the terms and meaning of the wager. But that case was not determined.

2 Burr. 695.

This also was an action of *assumpsit* on a policy of insurance, where the defendant insured the plaintiff, *interest or no interest*, against all enemies, pirates, takings at sea, and all other damages whatsoever. And upon trial it appeared, that the ship was taken by a pirate of *Sweden*, and was in his possession for nine days, and was then retaken by an *English* man of war, and after the suit commenced, was brought into *Harwich*. The question was, whether, in such a case, the defendant was responsible?

Depalbe v.
Ludlow.
Cornyn's
Rep. 360.

It was determined for the plaintiff. But although it was objected that the insurer was only responsible where the plaintiff had a property, and that the term of insuring, *interest or no interest*, was introduced since the revolution; yet it was said, that

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such insurance was good, and the import of it is, that the plaintiff has no occasion to prove his interest, and that the defendant cannot controvert it. And though the ship was here retaken, yet the plaintiff received a damage, for his voyage was interrupted; and the question is not, Whether the plaintiff had his ship, and did not lose his property, but what damage he sustained?

≡ Burr-695.

Lord *Mansfield* has also observed upon this case, that it was a wager policy, and the property could not be changed, for there was then no war, or declaration of war; that the court held, that as the ship was once taken in fact, the event had happened though she was afterwards recovered. His Lordship said, that the same observations were applicable to the case of *Pond v. King*.

Pond v.
King,
1 Will. 191.
and Lex
Merc. red.
4th edit. 302.

This was an action on a policy of insurance upon the *Salamander* privateer (of which the plaintiff was part owner), from the *Downs* to any port or place where she should sail for three months from the 1st of *December* 1744, *interest or no interest*, free from average, and without benefit of salvage; the insurance was against such perils as are usually mentioned in policies; the breach assigned is, that the *Salamander* was taken by a *French* ship of war within the three months, and was wholly lost, whereby she could not prosecute her voyage or cruise. The jury found a special verdict, stating, that the *Salamander* was taken by a *French* ship of war within the three months; that 117 of her men were taken out of her, and carried into *France*, and her guns taken out, and that she remained in the possession of the enemy from four o'clock in the afternoon of the 2d of *February* till five o'clock in the afternoon of the 5th of *February*; that before she was carried into any port she was retaken by an *English* privateer, and by the captain of the privateer kept eight days upon the high seas without sailing, and at the end of eight days the captain of the privateer took a *French* prize, and, together with her and the *Salamander*, endeavoured to come into some *English* port, but the wind not permitting, he carried them into *Lisbon*; that the *Salamander* remains there for the benefit of those to whom she belongs; that the plaintiff is interested, exceeding the sum insured: that the ship was prevented from finishing

finishing her three months' cruise by the capture, but that she was a living ship at the end of three months: that *Lisbon* is a neutral port; that the master of the privateer obtained a decree in the Court of Admiralty at *Gibraltar*, that the ship should be restored to the owners on payment of one third part for salvage.

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Lord Chief Justice *Lee*, after two arguments, delivered the unanimous opinion of the whole court: "The question is, Whether the capture of this ship, which was never carried *infra præfidia hostis* before she was retaken, and upon the matter as found by the verdict, shall be considered as a total loss, so as to entitle the insured to recover the whole sum insured? And although by the civil law it may not perhaps be adjudged a total loss, yet the rules of that law are not to govern us, but we must give our judgment according to the common law of *England*, and upon this agreement between the parties, whose intention appears, and must guide us. By the civil law, there must be a total loss to entitle the assured to recover, but the policy in this case extends to captures and other accidents. The meaning of the parties here is plain: the insured paid his premium in consideration of the insurer's undertaking, that the *Salamander* should cruise safely during three months; the jury have found that she was disabled from prosecuting her cruise for three months. We are all of opinion for the plaintiff, and that this is not an average, but a total loss to the insured: the insurance is to be understood for the voyage of three months, and in common sense it cannot be otherwise; so that as soon as the voyage is broken or interrupted, it is at an end. Safety during the three months is what is meant; but it appears that the ship was taken and detained within that time, and that the plaintiff was hindered in his cruise; and this, by our law, is a total loss to the plaintiff. I have avoided saying any thing whether this was a prize or not, as having never been carried *infra præfidia hostis*, because we are all of opinion that this is a total loss." Judgment for the plaintiff.

In the case of *Spencer v. Franco*, the plaintiff had caused himself to be insured on the *Prince Frederick* from *Vera Cruz* to *London*, interest or no interest, free of average, and without benefit of salvage. The ship was afterwards seized by order of the viceroy of *Mexico*, and the *Spaniards* turned her into a man of

Spencer v. Franco, 60-
ram Lord
Hardwicke,
Dec. 1796.
Lex Merc.
red. 4th edit.
p. 316.

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war, called the *Saint Philip*, and sent her as commodore, with a squadron of *Spanish* men of war, to the *Havannah*, they having first taken out the *South Sea Company's* arms, and made several alterations in her, and there was a war between *England* and *Spain*, and *Gibraltar* was actually besieged by the *Spaniards*. The defendants proved the signing of preliminary articles of peace before the seizure of the ship, and therefore insisted, that this seizure did not alter the property, and consequently the defendants were not liable: for if the property was not altered, this insurance made by the plaintiff, who had no interest, cannot bind, as nothing comes within the policy but a total loss: and though there be those general words in the policy, *restraint or detainment of princes*, Lord Chief Justice *Hardwicke* declared, that a war might begin without an actual declaration or proclamation, as in this case, by laying siege to *Gibraltar*, a garrison town; that as a war may begin by hostilities only, so it may end by a cessation of arms; and these preliminary articles being signed before the seizure of the ship, and there being a cessation of arms, he thought the ship being taken afterwards, not to be a taking by enemies, unless the jury took the caption to begin from the time the *South Sea* arms were seized, which was before the articles: that supposing the ship not taken by enemies, whether his detention for near the space of a year was, in this sort of policies, *viz. interest or no interest*, a detention within the policy; or whether in such policies the insurers are ever liable but in case of a total loss; and if so, this ship being afterwards restored, then he directed the jury to find for the defendants, which they accordingly did.

Dean v.
Dicker,
2 Str. 1250.

In another case, the insurance was on goods by the *Dursley* galley, *interest or no interest*, at and from *Jamaica* to *Bristol*. In her passage she was taken by a *Spanish* privateer, and carried into *Mores*, a port in *Spain*, kept eight days, and then cut out by an *English* ship. The plaintiff insisted, that this insurance, though on goods, was to be considered as a wager on the bottom of the ship: and therefore brought his action for a total loss. The defendant said, that by the stat. of 13 Geo. II. c. 4. the ship is to be restored to the owners upon paying salvage, and consequently this is only an average loss; and the plaintiff can only recover upon a total one. Lord Chief Justice *Lee* held, that the plaintiff ought to recover: for this is a wager upon a total loss in the

the voyage, and here has happened one; for being carried into port and detained eight days makes one. Where the policy is, "interest or no interest," the provisions of the act in cases of valued policies cannot take place. The act does not declare that the property is not gone by such a capture, but only provides for restoring the ship to whom it did, and shall be proved to have belonged. He said, it might be otherwise, where the ship was recaptured, before it was carried *infra presidia*, or in case of goods actually on board, and upon a valued policy.

An assurance was made on the *Dispatch* galley, interest or ^{Whitehead} no interest, free of average, &c. from *Jamaica* to *Hull*. In her voyage ^{St. Rance,} she was taken by a *French* privateer, and carried into *Hamburg*, ^{R. R. Mich., 1749.} and after being twelve days in the hands of the enemy, she was retaken by an *English* ship, and brought to *London*, where she was adjudged to be restored to the owner, paying salvage. The owner sold the ship, and paid the salvage. An action being brought on the policy, it was held to be a loss of the voyage; and a verdict was given accordingly.

These cases have been laid before the reader, without any comments, except such as have occurred from time to time to Lord *Mansfield*, as he has had occasion to mention them; and it was the less necessary to observe upon each particular case, as one general observation is applicable to all, namely that they were not policies upon *real interest*. Let it suffice then to repeat, that at this day, in cases of capture, the underwriter is immediately responsible to the insured. But if the ship be recovered before a demand for indemnity, the insurer is only liable for the amount of the loss actually sustained at the time of the demand: or if the ship be restored at any time subsequent to the payment by the underwriter, he shall then stand in the place of the insured, and receive all the benefits and advantages resulting from such restitution. All these regulations certainly have their foundation in the great principles of equity and justice; an observation which must be obvious to every one who recollects, that a policy of insurance is nothing more than a contract of indemnity.

Before the subject of capture and recapture is closed, it may be proper to mention, that by the late prize acts, if a ship be retaken before she has been carried into an enemy's port it shall

33 Geo. III.

c. 66. § 44.

43 Geo. III.

c. 160. § 42.

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Having thus endeavoured to explain the nature of captures by an enemy, as far as they affect the subject of insurances, I proceed now to treat of losses arising from another species of capture, namely, by detention; a part of our enquiry which will not demand a long or tedious discussion. The underwriter, by the express terms of his contract, is answerable for all loss or damage arising to the insured, "by the arrests, restraints, and detentions, of all kings, princes, and people, of what nation, condition, or quality whatsoever."

The only question then is, what shall be considered as such detention: and indeed the words used are so large and comprehensive, as hardly to admit of a doubt even upon that head.

Roccus de
affec. Not.
54.

The learned Roccus is of opinion "*ut si merces capta a potestate, seu iudice iustitiam administrante in illo loco, aut a populo, aut ab aliâ quâcunque personâ per vim, absque pretii solutione, tenentur, asscuratores solvere estimationem dominis mercium, factâ prius per dominos mercium cessione ad beneficium asscuratorum pro recuperandis illis mercibus, vel pretio ipsorum a capientibus.*" In another place he says, "*Regis & principis factum connumeratur inter casus fortuitos; ideo si rex et princeps retineant navem oneratam frumento ex causâ penurie, quapropter navis non potuerit frumenta asportare ad locum destinatum, tenentur asscuratores.*"

Roccus de
affec. Not.
65.

Malyne, 110.

Malyne lays down the law to be, that the insurers are liable for all losses by arrests, detentions, &c. happening both in time

time of war and peace, committed by the public authority of princes. And Lord *Mansfield* has said, that the insured may abandon in case merely of an arrest or embargo by a prince, not an enemy; and consequently such an arrest is a loss within the meaning of the word *detention*.

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2 Burr. 696.

What the word "*people*," in this clause of a policy of insurance, means, has lately been judicially settled in a case, where the declaration claimed a loss of corn, occasioned by the *unlawful arrest, restraint, and detention of people to the plaintiffs unknown*. The facts upon this part of the case were, that the ship being forced into *Ely harbour* in *Ireland*, and a great scarcity of corn happening to be there at that time, the people came on board in a tumultuous manner, took the government of the vessel from the captain and crew, weighed her anchor, by which she drove upon a reef of rocks, and would not leave her, till they had compelled the captain to sell almost all the corn considerably below the invoice price. The word *people*, it was contended at the bar, meant individuals of a nation as opposed to magistrates or rulers.

Nesbitt and
another v.
Lushington,
4 Term Rep.
783

Lord *Kenyon*.—"That which happened in this case does not fall within the meaning of "arrests, restraints, and detentions of kings, princes, and people." The meaning of the word *people* may be discovered here by the accompanying words, *noscitur a sociis*; it means, "*the ruling power of the country*."

Mr. Justice *Buller*.—"I cannot agree with the construction put at the bar upon the word *people*; it means *the supreme power; the power of the country*, whatever it may be. This appears clear from another part of the policy; for where the underwriters insure against the wrongful acts of individuals, they describe them by the names of "*pirates, rogues, thieves*;" then having stated all the individual persons, against whose acts they engage, they mention other risks, those occasioned by the acts of "*kings, princes, and people* of what nation, condition, or quality forever." Those words, therefore, must apply to *nations* in their collective capacity.

An embargo is an arrest laid on ships or merchandise by public authority, or a prohibition of state commonly issued to prevent foreign

Lex Merc.
res. 410-44
259

C H A P. IV. foreign ships from putting to sea in time of war, and sometimes also to exclude them from entering our ports. This term has also a more extensive signification, for ships are frequently detained to serve a prince in an expedition, and for this end have their loading taken out, without any regard to the colours they bear, or the princes to whose subjects they belong. The legality of such a measure has been doubted by some, but it is certainly conformable to the law of nations, for a prince in distress to make use of whatever vessels he finds in his ports, that may contribute to the success of his enterprise. Embargoes laid on shipping in the ports of *Great Britain*, by royal proclamation, *in time of war*, are strictly legal, and will be equally binding, as an act of parliament; because such a proclamation is founded on a prior law, namely, that the king may prohibit any of his subjects from leaving the realm. But in times of peace the power of the king of *Great Britain* to lay such restraints is doubtful; and therefore where such a proclamation issued in the year 1766, against the words of a statute then in force, although absolutely necessary for the prevention of a dearth in this country, it was thought prudent to procure an act of the legislature to indemnify those who advised, or who acted under that proclamation.

7 Geo. III. c. 7. **1 Magens, 67.** In case of detention by a foreign power, which in time of war may have seized a neutral ship at sea, and carried it into port to be searched for enemy's property, all the charges consequent thereon must be borne by the underwriter: and whatever costs may arise from an improper detention, must always fall upon him.

Salucci v. Johnson, B. R. Hil. 25 Geo. III. This was held by *Willes*, *Ashurst*, and *Buller*, justices, in the absence of Lord *Mansfield*, in a case, the circumstances of which are as follows: It was an insurance on the ship *Thetis*, a neutral ship; and upon the trial, a special case was reserved for the opinion of the court, stating, that the plaintiffs were *Tuscan* subjects, resident at *Leghorn*, sole owners of the ship *Thetis*, which sailed from *Leghorn*, and was captured by a *Spanish* ship off the coast of *Barbary*, with neutral goods on board, consigned to *London*. She was condemned as prize in the court of Vice Admiralty in *Spain*, which sentence was reversed; but upon another appeal to a superior court, the latter sentence was also reversed, and

and the former confirmed. The grounds of condemnation were two: 1st. That the ship *Thetis*, refused to be searched, and resisted with force, having fired at the *Spanish* ship: 2dly. That she had no charter party on board. The captain of the *Thetis* answered these two grounds: 1st. That he resisted and fired, because the *Spaniard* hailed him under false colours; 2dly. That he had taken the goods on board by the piece, and had not freighted his ship to any individual; in which case a manifesto was sufficient without a charter party. The sentence of the last court of appeal, although it condemns, admits the neutrality, for it states the vessel to be "*a Tuscan ship*." The last ground relative to the charter party was not insisted upon. Upon the other, the three learned judges above mentioned were of opinion, *that a neutral ship is not obliged to stop to be searched* (a); that the captain had not been guilty of barratry; that the searcher stops a neutral ship at his peril: that this was to be considered as a case of improper detention, and consequently that the plaintiff upon this policy was entitled to recover.

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But though an underwriter is liable for all damage arising to the owner of the ship or goods from the restraint or detention of princes, yet that rule shall not be extended to cases where the insured shall navigate against the laws of those countries, in the ports of which he may chance to be detained, or to cases where there shall be a seizure for non-payment of customs. This was so ruled by Lord Commissioner *Hutchins* in Chancery, in the year 1690; and the reason of it is obvious, because there is a gross fraud on the part of the owner of the property insured; and that no man shall take advantage of his own misconduct. If indeed any of those acts were committed by the master of the ship, without the knowledge of the insured, the underwriter would be liable, if not for losses by detention, at least for a loss by the barratry of the master, to which such conduct would most certainly amount.

2 Vern. 176.

Vide the
next chapter.

(a) This opinion of the learned judges does not seem to be well founded. But I shall hereafter state the argument more at length, in chap. 13, when I shall have occasion to refer to a very learned and elaborate judgment of Sir *W. Scott*, the judge of the admiralty, upon this point; and a subsequent decision of the court of King's Bench upon the subject. Post.

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It has been a question, whether the insurers are liable for the payment of damage arising by the detention or seizure of ships by the government of the country in whose ports the ship loads. Till lately there was only one common law case where this point was expressly in issue, and that was not decided.

Green v.
Young,
2 Ed. Reym.
840. 2 Salk.
444e

In evidence upon the trial in an action upon a policy of insurance, the case appeared to be, that the insurer agreed to insure the ship from her arrival at ——— in *Jamaica* during her voyage to *London*; and an embargo was laid upon the ship by the government; who afterwards seized the ship, converted her into a fireship, and offered to pay the owners. The question was, if this would excuse the insurers? *Holt*, Chief Justice, seemed to incline, that it would not, and that this was within the words, *detention of princes, &c.* but he gave no absolute opinion, the cause having been referred to three of the jury.

Vide ante,
p. 72.

2 Magens,
176.

2 Magens,
417.

The very general words made use of in policies go to support the idea entertained by Lord *Holt*, and although till lately there was no case where this point was expressly considered, yet it seems to have been taken as settled in many cases, which have come before the court. One instance immediately occurs, in the case of *Robertson v. Ewer*, which was cited in a former chapter. There, an embargo had been laid by Lord *Hood* on all shipping at *Barbadoes*; and it does not appear to have been doubted or questioned at the bar, that the insurer was liable for any loss which might have been sustained by such detention, provided the loss had happened to any of the property specifically insured. It is true, that it is declared by the ordinances of *France*, “that
“ if any ship be stopped by our orders in any of the ports of our
“ kingdom before the voyage be begun, the insured shall not, on
“ account of this detention, abandon or cede their effects to the
“ insurers.” A similar regulation is to be found in *Bilboa*, by which it is ordered, “that if any ship or ships insured, with
“ or without goods, shall be detained by his majesty’s order in
“ the ports of these kingdoms of *Spain*, before the commencement
“ of the voyage she is bound on, it shall be judged that no cession
“ can be made of them, but rather the insurance in such case
“ ought to be held null.” If these ordinances, when they use

the words, "commencement of the voyage," mean commencement of the risk insured, they agree with the laws of *England* (a); because the underwriter can never be answerable for any thing happening before that period: but when the risk insured is "at and from," if the ship be detained in the loading port, by order of the state, before her departure for the voyage, but after the risk commenced, the insurer by our law is liable for the damages occasioned by such detention, as the words in the policy do in themselves import no restriction to restraints and embargoes by foreign or hostile powers only.

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This question came on lately for consideration in the court of King's Bench; and it was unanimously decided in favour of the assured after two arguments at the bar. But the learned judges desired not to be considered as deciding upon the effect of an embargo laid on by our own sovereign upon ships loading in this country. The question came before the court upon a special case reserved for its opinion, upon the trial of an action on a policy of insurance on three ships, the *Adelaide*, *Adele*, and *Victor*, their stores, boats, and fishing materials, &c. upon two of them at and from *L'Orient*, and upon the third, at and from and after her arrival at *L'Orient*, and on all of them, "to all ports, seas, and places whatsoever, beyond and on this side the Capes of Good Hope and Horn, on the southern whale and seal fishery and trade, and until the ship's arrival back at *L'Orient*." The loss is stated by the declaration to have happened by the ships and their stores and provisions being, by authority of certain persons exercising the powers of government in *France*, at *Port Louis* with respect to one, and at *L'Orient* with respect to the two others, arrested and restrained from further prosecuting their voyages, and that they had thence hitherto been prevented and restrained therefrom under and by virtue of such restraint. The case stated that the ship *Adelaide* sailed from the port of *L'Orient* on the voyage insured, but was obliged to put back by stress of weather into *Port Louis*; and whilst she lay there, and the ships *Adele* and *Victor* were preparing for the voyages in the policies mentioned, and before the necessary passports and clearances could

Rotch v.
Edie, very
fully report-
ed in
6 Term Rep.
413.

(a) The French policies on the ship always attach only from the day the ship sails, unless the parties vary the general rule by a particular agreement. See the ordinances in 2 Magens, 163, 169. See *Portier's Traité du Contrat d'Assurance*, chap. 1. sect. 2. article 2. where the distinction I have taken in the text is also made.

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be obtained, on the 5th *February* 1793, an embargo was laid on all vessels in those ports. That the *Adelaide* was brought back to *L'Orient*, and the perishable stores of all the three ships sold; and the said three vessels with the rest of the stores now remain at *L'Orient*, under the embargo, which has continued ever since on all ships destined on long voyages; and none have since been permitted to sail, except those in government service or upon short coasting voyages. The *Adels* and *Victor* had entered outwards upon the voyages insured, when the embargo came; and that alone prevented the ships from failing. Notice of abandonment was given to the underwriters on the 27th *Feb.* 1793, and a total loss claimed; and the like notice and claim were repeated in *August* 1793 (a).

Lord *Kenny*.—"I have looked into all the cases which have been cited, and I have also considered the passages collected from foreign writers, and the most respectable of them seem to me to coincide with the construction, which an *English* court of justice would put upon such an instrument as the present. This plaintiff is under no disability to sue, and the defendant has entered into an engagement to indemnify him against arrests, restraints, and detentions of all kings, princes, and people, of what nation, condition, or quality soever. By this peril, the ship has been detained near three years, and the voyage is defeated; but the plaintiff is to be told this is not a loss within the policy. No common man reading the words of the policy could doubt upon the question: and it is by artificial reasoning only, collected by great reading upon foreign authors, that his claim can be repelled. But in truth, when examined, the research turns out to be all one way, and that is in favour of the plaintiff. *Roccus*, *Le Guidon*, *Green v. Young*, from Lord *Raymond*, are all one way: and although Lord *Holt* is said not to have given an absolute opinion, every thing that fell in judgment from that great man is deserving of the highest attention. Lord *Mansfield* too has given an opinion upon the very point (2 *Burr.* 696, and ante, p. 103.); and when to this current of authorities

(a) Some other facts were stated; but as the effect of them was to shew that the plaintiff was either an alien enemy, or in partnership with an alien enemy; and as the facts did not support the argument which was to be raised upon them, and did not form an ingredient in the judgment of the court, I forbear to state them.

we add the words of the policy itself, it is perfectly clear. Suppose war had been declared, and the ship had been detained in port as a prize, could there have been a doubt? and I can see no difference between the cases.

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The other judges delivered their opinions *seriatim*, concurring unanimously with his lordship; and there was judgment for the plaintiff (a).

By what has been said it appears, that before the insured can recover against the underwriter in cases of detention, he must first abandon to the insurers his right, and whatever claims he may have to the goods insured. This point will be fully treated of in the chapter of Abandonment. It will be sufficient here to remark, that in most of the countries on the continent, the time

(a) In deciding the above case, the learned judges expressly declined giving an opinion upon the effect of an embargo laid by the government of this country upon a ship insured here. The case of *Green v. Young*, above stated, was indeed an embargo by the British government. The very point arose, and came on for argument upon a special case in a cause of *Bischoff v. Agar*, in East. Term 1797. But it not being stated whether the abandonment was made in a reasonable time, and the court inclining to think the abandonment should be in the first instance, they sent the case back for the jury to find that fact: and upon the second trial the jury, having found that the abandonment was not made in due time, gave a general verdict for the defendant; and the main question respecting the embargo was not decided. But during the present war in Europe, it has become necessary for the courts to decide this question; for in *Touteng v. Hubbard*, 3 Bos. and Pull. 291, where the point arose upon a charter party, Lord *Alvanley*, referring to the above case of *Bischoff v. Agar*, declared it to be the opinion of the whole court, that a British merchant is not liable to answer for any damages, which the owner of a foreign vessel may sustain, from an embargo laid by the British government on foreign ships, in the nature of reprisals and partial hostility. And his Lordship goes on to declare it to be the opinion of himself and his brethren, that an insurance for the benefit of a foreigner, against the effects of such an embargo as that in question (which was an embargo by the British government upon all *Swedish vessels*) would be illegal. And a distinction was taken between such a case and that of *Green v. Young* (ante), which was a question between two British subjects. I lament that I cannot here give Lord *Alvanley's* very able and learned argument entire, and to abridge it would be doing it great injustice; I therefore refer the reader to the Reports of Messrs. Donsanquet and Puller.

And in a case at Nisi Prius before Lord *Ellenborough*, his Lordship was of opinion, where the assured was a subject of the country, he might recover against a British underwriter for the loss sustained by the detention of the British government, that being totally different from the case of a foreign assured; for amongst our own subjects, whether the plaintiff or defendant sustain the loss, it cannot prejudice the general interests of the country. Page v. *Thompson*, sitings after Hil. 1804, at Guildhall. The same point was ruled by his Lordship in *Visger v. Prescott*, with respect to neutral property. 5 Esp. 184.

for

C H A P. for abandonment in such cases is fixed to a limited period after the event has happened. In *Bilboa* and *France* the cession must be made in six months, if the loss has happened in any part of *Europe*; and within a year, if in a more distant country. A similar regulation as to time is established by the ordinances of *Middleburgh* in *Zealand*. By the law of *England*, there is no positive rule on this subject, consequently an insured has a right to abandon immediately upon hearing of the detention. But it should seem, that in order to prevent the underwriters from being harassed, the insured ought to make his election, whether he will abandon or not, within a reasonable time; and what that shall be, must in general depend upon the circumstances of the case.

See the case of *Mitchell v. Edie*, post ch 9, where this point has been considered and settled; and see ante,

p. 109. note (a), the case of *Bischoff v. Agar*, where held that the abandonment must be in the first instance.

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2 Magens, 175. 416.

2 Magens, 23.

CHAPTER THE FIFTH..

Of Losses by the Barratry of the Master or Mariners.

IT does not seem to have been any where precisely ascertained, from what source the term *barratry* has been derived. C H A P.
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Indeed the derivations of barratry have rather tended to confound, than to throw any light upon the subject: for its root has been so frequently altered, according to the caprice of the particular writer, that it is impossible to decide which is the true one. The *English*, however, most probably have taken it from the *French*, *barrateur*, which is to be traced to the *Italians*: but where the latter found this word is a thing by no means clear.

Whatever the derivation may be, the word seems to have been originally introduced into commercial affairs by the *Italians*, who were the first great traders of the modern world. In the *Italian* dictionary, the word *barratrare* means to cheat; and whatsoever is done by the master, amounting to a cheat, a fraud, a cozening, or a trick, is barratry in him. *Posslethwaite*, in his dictionary of trade and commerce, defines *barratry* thus: "Bar-
" ratry is committed when the master of the ship, or the ma-
" riners, cheat the owners, or insurers, whether it be by run-
" ning away with the ship, sinking her, deserting her, or em-
" bezzling the cargo." In another place, the same author ob-
serves, "one species of barratry in a marine sense is, when the
" master of a ship defrauds the owners or insurers, by carrying
" a ship a course different from their orders." These defini-
tions are so very comprehensive, that they seem to take in every
case of barratry, known to the law of *England*, as far as we can
collect the principles from the several cases that have been de-
cided. From a review of those cases, and they are but few, it
appears that any act of the master, or of the mariners, which is
of a criminal or fraudulent nature, or which is grossly negligent,
tending to their own benefit, to the prejudice of the owners of the
ship, without their consent or privity, is barratry.

Cowp. 154.

1 vol. p. 214.

1 vol. 136.

1 Stra. 581.

2 Stra. 1173.

Cowp. 143.

1 Term Rep.

3d. 7 Term

Rep. 505.

It

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Comp. 155.

It is not necessary, in order to entitle the insured to recover for barratry, that the loss should happen *in the act of barratry*: that is, it is immaterial, whether it take place *during the fraudulent voyage*, or *after* the ship has returned to the regular course; for the moment the ship is carried from its right track with a fraudulent intention, barratry is committed.

Lockyer v.
Offley,
1 Term Rep.
p. 258.
Vide ante,
c. 2.

But the loss, in consequence of the act of barratry, must happen *during the voyage insured*, and within the time limited by the policy, otherwise the underwriters are discharged. Thus, if the captain be guilty of barratry by smuggling, and the ship afterwards arrive at the port of destination, and *be there moored at anchor twenty-four hours in good safety*: the underwriters are not liable, if, after this, she should be seized for that act of smuggling.

Comp. 154.

From the above descriptions of barratry, it will appear, that if the act of the captain be done with a view to the benefit of his owners, and not to advance his own private interest, no barratry has been committed. I have said, that to constitute barratry, it must be without the knowledge or consent of the owners; because nothing can be so clear as this, that no man can complain of an act done, to which he himself is a party. But it is material to consider, in what sense the word owner is to be understood, in this definition. It has been argued, that if *A.* be the owner of a ship, and let it out to *B.* as freighter, who insures it for the voyage; and if the deviation be with the knowledge of *A.* though unknown to *B.* the insurer is discharged. But the court over-ruled that argument, and said, that in order to discharge the insurer from the loss by barratry, it must appear, that the act done was by the consent, or with the privity of the owner, *pro hac vice*, that is, the freighter, the person insured.

1 Magens,
73-130.215.

These principles being advanced, it will now be sufficient to shew that they are supported and established by the cases which have been decided. But before they are quoted, it will be proper to observe, that by the positive regulations of *Middleburgh*, *Amsterdam*, *Hamburg*, and other countries in *Europe*, the underwriters are universally held to be answerable for losses arising by the barratry of the master or mariners. By the ordinances of *Rotterdam*, the owners of ships are prohibited from making

insurances against the barratry of the masters, whom they themselves shall appoint; but they may insure against their neglect, and also against the villainy of the sailors, and of such masters as may happen to succeed to the command of the ship in foreign parts, without the knowledge of the owners, on account of the decease or absence of the master originally appointed. No such rule prevails in the law of *England*; but the insurer undertakes generally and by express words inserted in the policy, to indemnify the owner of the ship or cargo against all losses which he may happen to sustain by the barratry of the master or mariners, even though the master should have been appointed by himself: a circumstance which is rather singular, for the insurer to undertake for the conduct of a man whom he can neither appoint nor dismiss.

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2 Magens,
89.

In an action upon the case on a policy of insurance, on the ship *Riga Merchant*, "at and from *Port Mahon to London*, "against the barratry of the master (among other things), and "all other damages, dangers, and misfortunes, which should "happen to the prejudice and damage of the said ship," the breach assigned in the declaration was the loss of the ship, "by "the fraud and negligence" of the master. The plaintiff had judgment in the court of Common Pleas. The defendant brought a writ of error, and it was contended by his counsel, that the words "*fraud and negligence*," used in the declaration, were more general than the word *barratry*: and that the breach should have been express, that the ship was lost by the barratry of the master: that if the word *barratry* do import fraud, yet it does not import neglect; and the fact here alleged is, that the ship was lost by the fraud and negligence of the master (a).

Knight v.
Cambridge,
2 Ld. Raym.
1749.
1 Stra. 581.

But the court were unanimously of opinion, that there was no occasion to aver the fact in the very words of the policy; but that if the fact alleged came within the meaning of the words in the policy, it would be sufficient. Barratry imports fraud: and he that commits a fraud may properly be said to

(a) It now appears from manuscript notes of the following case of *Stamma v. Brown*, that the barratry committed in point of fact in *Knight v. Cambridge*, was "a sailing out of port, without paying the port duties, whereby the goods were seized and lost." See *Earle v. Rowcroft*, 8 East's R. 126. Post. 121.

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be guilty of a neglect, viz. of his duty. Barratry of a master is not to be confined to the master's running away with the ship; but it extends to any fraud of the master. The end of insuring is to be safe in all events; and it would be very prejudicial if we were to make loop-holes to get out of these policies. The judgment was affirmed.

Stannus v.
Brown,
2 Sura. 1173.

In another case, the ship the *Gothic Lyon* being advertised to go to *Marseilles*, goods were shipped on board her, on behalf of the plaintiff; and a bill of lading was signed by the master, whereby he undertook to go straight to *Marseilles*, and the defendant underwrote a policy from *Falmouth* (where the goods were taken in) to *Marseilles*. Before the ship departed from the port of *London*, another advertisement was published for goods to *Genoa*, *Leghorn*, and *Naples*; and the plaintiff's agent was told, that it was intended to go to those ports first, and then come back to *Marseilles*; but he insisted that his bargain was to go directly to *Marseilles*; and he would not consent to let her pass by *Marseilles*, or alter his insurance.

The ship, however, did pass by *Marseilles*; and after delivering her cargo at the other ports, set out on her return for *Marseilles* with the plaintiff's goods; but in a voyage thither, was blown up in an engagement with a *Spanish* ship. In an action upon the policy, the breach assigned was a loss by the barratry of the master.

Lord Chief Justice *Lee* told the jury, that this voyage, being against the express agreement to go first to *Marseilles*, seemed to be more than a common deviation, as it was a formed design, to deceive the contractor. He compared it to the case of sailing out of port without paying the duties, whereby the ship was subjected to forfeiture, and which has been held to be barratry.

The jury staid out some time, and upon their return, asked the Chief Justice, "Whether, if the master were to have no benefit to himself by passing by *Marseilles*, and went only to the other places first for the benefit of his owners, that would be barratry?" and the Chief Justice having answered "No," they found for the defendant.

A new

A new trial being moved for, the case was argued; and all the judges of the King's Bench were of opinion that the verdict was right: for the master has acted consistent with his duty to his owners; and the plaintiff's agent knew of the intended alteration before the goods were put on board, and might have refused to ship them, or have altered the insurance. The court also held, that to constitute barratry (*a*), there must be something of a criminal nature as well as a breach of contract; and that as the breach was assigned upon the barratry only, it was not supported by the evidence. So the defendant had judgment.

In Sir *John Strange's* Reports we find another case upon the subject of barratry. The ship *Mediterranean* went to sea in the merchant's service, having also a letter of marque; and was insured by the defendant, being bound from *Bristol* to *Newfoundland*. In her voyage she took a prize, returned with it to *Bristol*, and received back a proportionable part of the premium. Another policy was then made, and the ship set out, the captain having first received express orders from the owners that if he took another prize, he should put some hands on board such prize, and send her to *Bristol*; but that the ship in question should proceed with the merchant's goods. Another prize was taken in the due course of the voyage; and the captain gave orders to some of the crew to carry the prize to *Bristol*, and designed to go on to *Newfoundland*: but the crew opposed him, and insisted that he should go back, though he acquainted them with his orders: upon which he was forced to submit, and, on his return, his own ship was captured, but the prize got in safe.

Elton v.
Brogden,
2 Stra. 1264

In an action against the insurers, it was insisted, that this was such a deviation as discharged them. But Lord Chief Justice *Lee* and the jury held, that this deviation was excused by the force upon the master, which he could not resist, and therefore fell within the plea of necessity, which had always been allowed. The plaintiff's counsel thought it was barratry: but the Chief Justice was of opinion, that it did not amount to that, as the

(*a*) In *Phyn v. The Royal Exchange Company*, 7 Term R. 505. post. p. 121, and also in *Earle v. Rowcroft*, 8 East, R. 126. it appeared from a manuscript report of the case of *Stamma v. Brown*, read by Mr. Justice *Lawrence*, that Lord Chief Justice *Lee*, in defining barratry said, "it must be some breach of trust in the master *ex maleficio*."

C H A P. ship was not run away with, in order to defraud the owners.
 V. But as this was a case not of wilful deviation, but of a deviation
 through necessity, the insurers were held to be answerable, and
 the plaintiff had a verdict for the sum insured (a).

These are all the common law cases, which are to be found on the subject of barratry during a long series of years, viz. from the first origin of insurances, till the year 1774, when a case arose, in which all the doctrine on this head was fully considered.

Vallejo and
 another v.
 Wheeler,
 Cowp. Rep.
 143.

It was an action on a policy of insurance upon goods on board the *Thomas* and *Matthew* from *London* to *Seville*. The policy was made in the common form, with liberty to touch at any ports or places, &c. The loss was assigned different ways in the declaration: First, by storms and perils of the sea, in consequence of which, the ship was obliged to go to *Dartmouth* to be repaired; and, that afterwards, a further loss happened by storms, &c. Secondly, that it happened by storms and perils of the seas in the voyage generally; and Thirdly, by the *barratry* of the master.

The cause was tried before Mr. Justice *Ashburn* at *Guildhall*, at the sittings after *Easter* term 1774, by a special jury. On

(a) In an appeal from the East Indies, heard before the Lords of the Privy Council at the Cockpit, Sir R. P. Arden, the Master of the Rolls, in observing upon the above case of *Elton v. Brogden*, said, he thought it must be ill reported in *Strange*; for, upon the facts stated, there could be no doubt, but that the *mariners* had committed *barratry*; and he was therefore inclined to think, as Lord Mansfield appeared to have done in commenting upon this case in that of *Vallejo v. Wheeler*, that the policy must have been special, probably not including *barratry* of the mariners. *De Frise v. Stephens*, 1st July 1800. But with deference to such high authority, that could hardly have been the case; for otherwise the plaintiff's counsel acted most absurdly, in arguing that this conduct was *barratrous*, as from the above report they appear to have done, if *barratry* was a risk specially excluded from the policy. I have been at some pains to get at the record: but after a personal and diligent search, there does not appear to have been any judgment docketed; and, therefore, as I could not obtain the number of the judgment roll, a search amongst the records themselves would have been almost fruitless. Certainly, however, the ground upon which the decision in *Elton v. Brogden* turned, may well be doubted; as the conduct of the mariners seems to have been clearly *barratrous*: but the decision itself was correct; because a deviation, if occasioned by *barratry* does not affect the claim of the assured to recover; but on the contrary charges the underwriters. See observations upon this case by Lord Chief Justice (Sir James) Mansfield, in pronouncing judgment in the cause of *Scott v. Thompson*. 1 New Rep. p. 181, where his Lordship seems to think the conduct of the sailors not *barratrous*.

the

the trial it was proved, that this ship was put up as a general ship from *London* to *Seville*; and was let to freight to one *Darwin*, to whom she was chartered by *Brown* the captain: that it is the course of vessels going on this voyage, to stop at some port in the west of *Cornwall*, to take in provisions: that this ship having taken her cargo on board, sailed from *London* to the *Downs*: that while she lay there, all the other ships bound to the westward bore away; but she staid till the night after, and then sailed to *Guernsey*, which was out of the course of the voyage: that the captain went there for his own convenience, to take in brandy and wine on his own account: after which he intended to proceed to *Cornwall*: that the night after the ship quitted *Guernsey* she sprung a leak, which obliged her to put into *Dartmouth*. When she was refitted, she set sail again and proceeded for *Helford* in *Cornwall*, where it was always intended she should stop to take in provisions; but in her way she received further damage, and on her arrival there, was totally incapable of proceeding on the voyage, and the goods were much damaged. It was attempted on the part of the defendant to prove, that one *Willes* was the owner of the ship: that the voyage to *Guernsey* was on his account, and that the goods taken on board there were his property: but this evidence went little further than information and belief, except that it was proved, that when the ship arrived at *Helford*, the wine was delivered to him in his cellar. The learned judge directed the jury, that if the going to *Guernsey* was without the knowledge of *Darwin*, it was barratry, and they ought to find for the plaintiff; but if done with his knowledge, then it was not barratry: that if they should be of opinion, that it was without the knowledge of *Darwin*, he desired them to say, whether they thought it was with the knowledge of *Willes* or not. The jury found a verdict for the plaintiff, and said, they thought the going to *Guernsey* was without the knowledge of *Darwin*, whom they looked upon to be the true owner; but they were of opinion, it was with the knowledge of *Willes*.

A motion was afterwards made for a new trial; and the case, being a question of great consequence to the mercantile world was twice argued at the bar; after which the judges were unanimously of opinion, that the plaintiff was entitled to recover, but they delivered the reasons of their judgment *seriatim*.

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Lord *Mansfield*.—"The ground of the motion for a new trial in this case is, that under the circumstances, as they were given in evidence to the jury, the carrying the ship to *Guernsey*, was merely a *deviation*, but not *barratry*. Much more stress was laid at the trial, than in either of the arguments, upon this fact; namely, that the deviation being with the knowledge of *Willes* the owner (though not owner *pro hac vice*) of the ship, it could never be *barratry*; and therefore the jury were pressed to say, whether it was with the consent of *Willes* or not; and they said, "It was." To be sure nothing is so clear, as that if the owner of a ship insure, and bring an action on the policy, he can never set up as a crime a thing done by his own direction or consent. It was therefore a material fact to proceed upon, if *Willes* had had any thing to do in the case; but he had not. It appeared to me, that the nature of *barratry* had not been judicially considered, or defined in *England* with accuracy. In all mercantile transactions, the great object should be certainty: and therefore, it is of more consequence that the rule should be certain, than whether the rule is established one way or the other; because speculators in trade then know upon what ground to proceed." His lordship then stated the three cases above quoted from *Strange*; and after giving a definition of the word *barratry*, he proceeded thus: "In this case, the underwriter has insured against all *barratry* of the master; and we are not now in a case where the owner or freighter is privy to it; if we were, it is evident, that no man can complain of an act, to which he is himself a party. In this case, all relative to *Willes* may be laid out of it: he is originally the owner; but not the insurer here. *Darwin* was the freighter of the ship, and the goods that were on board were his: if any fraud be committed on the owner, it is committed on *Darwin*. The question then is, What is the ground of complaint against the master? He had agreed to go on a voyage from *London* to *Seville*; *Darwin* trusts he will set out immediately, instead of which the master goes on an iniquitous scheme, totally distinct from the purpose of the voyage to *Seville*: that is a cheat and a fraud on *Darwin*, who thought he would set out directly; and whether the loss happened in the act of *barratry*, that is *during* the fraudulent voyage, or *after*, is immaterial, because the voyage is equally altered, even though there is no other iniquitous intent. But in the present case
there

there is a great deal of reason to say, that the loss sustained was in consequence of the alteration of the voyage. The moment the ship was carried from its right course, it was barratry; and here the loss happened immediately upon the alteration. Suppose the ship had been lost *afterwards*, what would have been the case of the insured if he were not secured against the barratry of the master? He would have lost his insurance by the fraud of the master; for it was clearly a deviation, and the insured cannot come upon the underwriters for a loss, in consequence of a deviation. Therefore, I am clearly of opinion, that this smuggling voyage was barratry in the master." C H A P.
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Mr. Justice *Aston*.—"I wonder that there should remain a doubt at this day, what is meant by barratry in the master. In different ordinances different terms are used; but they all have the same meaning. In one of the ordinances of *Stockholm*, it is called "knavery of the master or mariners;" and the facts stated here, clearly fall within that description. Where it is a deviation with the consent of the *owner of the vessel*, and the master is not acting for his own private interest; in such case it is nothing but a deviation with the consent of the owner, and the underwriter is excused. In this case the hull of the ship belonged to *Willes*; but he had nothing to do with it, having chartered it to *Darwin*: the jury therefore did right in considering *Darwin* the owner *pro hac vice*. Having considered him in that light, the conduct of the master was clearly barratry; for he was acting for his own benefit, without intending any good to his owner, and without his consent and privity. Nobody knows when the first commencement of the injury happened; but most probably, on the return of the ship to *Dartmouth* from *Guernsey*, where he had been for the purpose of smuggling. Therefore, I am clearly of opinion, that this change of the voyage for an iniquitous purpose, was barratry; which is not confined to the running away with the ship, but comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured."

Mr. Justice *Willes*.—"The only doubt I had in this case was, at what time the loss happened; and I think it may reasonably be said to have happened in consequence of the smuggling voyage: for if the ship had proceeded on her first intended course,

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she would have escaped the storm. Though this was a deviation, yet it is a fair and just rebutter to say, that it was barratry in the master, which is a peril insured against by the policy."

Mr. Justice *Asbhurst* continued of the same opinion, which he held at the trial; and the rule for a new trial was discharged by the unanimous opinion of the whole court.

Robertson v.
Ex. r. Vide
the last
chapter.

In another case, which has already been twice cited for another purpose, Mr. Justice *Buller*, who tried that cause, seemed to think, that the breach of an embargo was an act of barratry in the master.

Ross v.
Hunter,
4 Term Rep.
23. See post.
p. 127. for
another
point.

In a subsequent case, which was an action on a policy on goods on board the *Live Oak*, whereof *Joseph Rati* was master, at and from *Jamaica* to *New Orleans*, it appeared that the ship was put up as a general ship at *Jamaica* in 1783; that she failed on the voyage insured in *May* 1783, and arrived in *June* following at the mouth of the river *Mississippi*, which leads up to *New Orleans* in *Spanish America*, at the distance of about 35 leagues. When the captain had got thus far he dropped anchor, and went in his boat up the river to *New Orleans*, and on his return without carrying the ship to her port of destination, stood away for the *Havannah*, after which he was never heard of. It appeared that he had a private adventure of negroes of his own on board, which there was reasonable evidence for supposing he intended to have disposed of at *New Orleans*; but finding it difficult to do so, on account of a prohibition to import them into the *Spanish* government, he went to the *Havannah*. The jury found for the plaintiff on the count in the declaration, charging the barratry of the master; and the whole court of King's Bench, upon a motion for a new trial, were of opinion, that the facts stated amounted clearly to the crime of barratry.

Miles v.
Evans,
6 Term Rep.
39. See
post.

So also it has been held by the Court of King's Bench, that if the Captain of a ship, contrary to the instructions of his owner, cruise for and take a prize, and the vessel is afterwards lost in consequence of it, he is guilty of barratry, even though he libel his prize in the Court of Admiralty in the name of himself and his owner; and though the owner had procured a letter of marque, solely with a view to encourage seamen to enter, and

without any intention of using it for the purpose of cruising ; for whatever is done by the captain to defeat or delay the performance of the voyage, is barratry in him, it being to the prejudice of his owners ; and though the captain might conceive that what he did was for the benefit of his owners, yet if he acted contrary to his duty to them, it is barratry. In this case it also appeared, that the captain had boarded and plundered an American ship, which they afterwards released, before he cruized for and took the prize in question.

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Two cases have lately arisen in which the doctrine of barratry was much considered : in the first of them the Court of King's Bench, after considerable argument, were unanimously of opinion, that there must be fraud to constitute barratry, and that the jury, by negating fraud, had in truth, by that finding, negated barratry.

Phyn v. The
Royal Exch.
Assur. Com.
7 Term Rep.
505.

But in the second of those cases, the definitions of barratry, and the ingredients necessary to constitute that offence, were very elaborately argued at the bar : and after time taken for deliberation, Lord *Ellenborough* pronounced the unanimous judgment of the Court, in a very learned and luminous argument, in which his Lordship entered into a full consideration of all the prior cases, marked their relative distinctions, laid down the true definition of the offence, and guarded the hearer from imagining that the supposed generality of his doctrine could extend to cases, which evidently could not fall within the scope of his reasoning. I lament that I have not space to give this judgment verbatim : but the substance shall be detailed for the general reader, and professional men must be referred to the larger printed account in Mr. *East's* Reports.

It was an action on a policy of insurance, at and from *Liverpool* to the coast of *Africa*, during her stay and trade there, and to the port of sale in the *West Indies*, and the plaintiffs averred the loss to be by barratry of the master. It appeared in evidence that the master, who was also supercargo, on his arrival off *Cape Coast Castle*, a British settlement on the coast of *Africa*, let go an anchor and began to trade for two days there ; but receiving intelligence that he could barter his goods for slaves more expeditiously and advantageously at *D'Elmina*, a Dutch fort,

Earle and
others v.
Rowcroft,
8 East's
Rep. 126.

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fort, about seven miles to windward, he weighed anchor and proceeded to this latter place, which had the *Dutch* flag flying and guns mounted, where he exchanged his goods, consisting, amongst other things, of muskets and gunpowder, with the *Dutch* governor, and another resident there, for slaves. *Holland* was at that time at war with *Great Britain*, and he had a letter of marque on board against the *French* and *Dutch*. After taking on board a number of slaves, the captain who was then on shore at *D'Elmina*, receiving information that an *English* frigate was in sight, sent a note on board to his own ship, directing her to sail immediately to *Cape Coast*, to prevent mischief, as he expressed himself; but before she reached *Cape Coast* she was pursued and captured by the *English* frigate, and condemned for having traded with the enemy. It further appeared, that it had been usual to keep up a trading intercourse in boats and small craft, between the *English* and *Dutch* settlements on this coast, even in time of war between the mother countries; and that the captain's object in going to *D'Elmina* was to complete his cargo as cheaply and expeditiously as he could. It was admitted that he had no particular instructions to go there, but that he was directed generally to make the best purchases with dispatch. It was also proved that when the ship was about to go to *D'Elmina*, the surgeon asked the captain, if there was no impropriety in going there, to which he answered that they should be soon gone, and nobody would know it; and also that besides his usual pay as captain, he had a commission on purchases and sales, which he was entitled to receive at the end of the voyage. Lord *Ellenborough* at the trial was of opinion, that this trading with the enemy by the captain, without the authority of his owners, though intended principally for their benefit, being in contravention of his duty to them, and subjecting their property to confiscation, was barratry: but as the case was new in specie, his Lordship gave the defendant leave to move to enter a nonsuit. A motion having accordingly been made for that purpose, it was insisted by the counsel for the defendant, that the act done must be a breach of trust, and done *ex maleficio*; and that here the obvious motive of the act was to make the speediest and cheapest purchases for his employers. After the argument, the Chief Justice said, the Court would look into the cases; but added, "I cannot refrain from making

making a few observations now. It has been asked, How is this act of the captain, in going to *D'Elmina*, in order to purchase the cargo for his owners more cheaply and more expeditiously, a breach of trust, as between him and them? Now I conceive that the trust reposed in the captain of a vessel obliges him to obey the written instructions of his owners, where they give any; and where his instructions are silent, he is at all events to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage; because in the absence of express orders to the contrary, obedience to the law is implied in their instructions. Therefore the master of a vessel, who does an act in contravention of the laws of his country, is guilty of a breach of the implied orders of his owners. I cannot therefore for a moment suffer it to be supposed that a captain is not guilty of a breach of trust to his owners, who, in contravention of the law, (the observance of which, nothing being expressed to the contrary, is implied in their orders) does an act which is injurious to them." In a few days afterwards

Lord *Ellenborough* delivered the judgment of the Court. "The question in this case is, whether a loss, of a ship insured, by an illegal act of the master, not authorized by his owners, in going into *D'Elmina*, a *Dutch*, and enemy's, port on the coast of *Africa*, and trading there for slaves by a barter of arms and warlike stores, on account of which illegal traffic, the vessel insured was seized by a king's ship, and afterwards condemned on that account in the *West Indies*, be barratry: or whether, as was contended on the part of the defendant, in order to constitute barratry, the act should not appear to have been done with a view of promoting the master's benefit to the prejudice of his owners?" His Lordship then proceeded to state the meaning of the word in foreign languages, and to quote and comment upon the various cases in our law books, in which the extent of the term barratry had necessarily been considered: his Lordship then went on thus; "After these various decisions of courts of law, we are certainly warranted in pronouncing that a *fraudulent breach of duty by the master, in respect to his owners; or, in other words, a breach of duty, in respect to his owners, with a criminal intent, or ex maleficio, is barratry.* And with respect to the

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the owner of the ship or goods, whose interest is to be protected by the policy, it can make no difference in the reason of the thing, whether the prejudice he suffers be owing to an act of the master, induced by motives of advantage to himself, malice to the owner, or a disregard to those laws, which it was the master's duty to obey, and which (or it would not be barratry) his owners relied upon his observing. It has been strongly contended on the part of the defendant, that if the conduct of the master, although criminal in respect of the state, were in his opinion likely to advance his owner's interest and intended by him to do so, it will not be barratry; but to this we cannot assent. For it is not for him to judge in cases not entrusted to his discretion, or to suppose that he is not breaking the trust reposed in him, but acting meritoriously, when he endeavours to advance the interest of his owners by means which the law forbids, and which his owners also must be taken to have forbidden, and not only from what ought to be, and must therefore be presumed to have been, their own sense of public duty, but also from a consideration of the risk and loss likely to follow from the use of such means. In laying down this doctrine, we feel ourselves supported by the several eminent authorities already referred to. And in giving this opinion, we do not feel any apprehension that simple deviations will be turned into barratry, to the prejudice of the underwriters; for unless they be accompanied with fraud or crime, no case of deviation will fall within the true definition of barratry, as above laid down. Another argument was used, which hardly appears to have been used seriously; namely, that the captain in this case united in himself the two characters of supercargo and captain; and that as captain, he must be considered as obeying the directions of his owners, given to himself as captain, by himself, in his character of supercargo. It is sufficient to state such an argument to shew it can have no weight. The directions of the owners as to the conduct of the voyage, and as to the places where the trade was to be carried on, are to be looked for in their instructions; which, coupled with their duty to their country, must, during every moment of the voyage, be considered as either expressly or impliedly directing the captain to conduct the ship to those places only where trade might be carried on without violating the laws of their country." The plaintiffs therefore retained their verdict.

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The court therefore in the last case cannot be considered as laying down any new rule ; but only luminously explaining and expounding the rule, as collected from all the former decisions : for Lord *Ellenborough* most pointedly declares, that in laying down the doctrine he has done, the Court feel themselves supported by the several eminent authorities referred to ; and the broad principle is this : *that a breach of duty by the master in respect to his owners, with a fraudulent or criminal intent, or ex maleficio, is barratry.* His Lordship is at the same time anxious to declare that simple deviations from the course of the voyage, unless accompanied with fraud or crime on the part of the master, will not constitute barratry.

It has been a question, who are meant by the owners in the definition of barratry ; but in the case of *Vallejo v. Wheeler*, it was settled, that the freighter of the ship is to be considered as the owner of it for the particular voyage : and it seems also clearly settled by the same case, that if an act be committed *with* the consent of the owners of the ship, that cannot be barratry. It was, however, in a later case, insisted upon at the bar, that an act of the captain, without the consent of the owners of the goods, who were the insured, *though with the consent of the owners of the ship*, was barratry, so as to charge the underwriters. But this argument was overruled by the court ; and could not have been admitted without overturning all former decisions upon the subject. Barratry implies something contrary to the duty of master, and mariners, *in the relation in which they stand to the owners of the ship* ; and although they may make themselves liable to the owners of the goods for misconduct, yet not for *barratry*, which can be committed against the owners of the ship, and them only.

The case, in which this point was settled, was an action on a policy of insurance, made by *Hague* before he became a bankrupt, on goods laden in the ship *Rachette* (otherwise the *Bellona*) for a voyage from *London* to *Rochelle*, subscribed by the defendant for 120*l.* at 7*l.* 10*s.* per cent. premium. The cause was tried at *Guildhall* before Mr. Justice *Buller*, when a verdict was found for the plaintiff, subject to the opinion of the court, upon the following case : That the bankrupt shipped on board the ves-

Nutt and
others, as-
signees of
Hague v.
Bourdieu,
1 Term Rep.
323.

fel

C H A P.
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fel in question goods to the amount of 1,800*l.* for *Rochelle*. That the captain, by the instigation and direction of Messrs. *Le Grands*, the owners of the ship, went with the ship and cargo to *Bordeaux* instead of *Rochelle*, where the cargo was sold by the agent of *Le Grands*. That a petition was presented by the plaintiffs to the lieutenant-general of the Admiralty of *Guienne*, stating the whole of the transaction between the bankrupt and the owners and captain; that in order to procure a landing at *Bordeaux*, their original destination being to *Rochelle*, false bills of lading were made out by the captain, at the instigation of *Le Grand*: the petition concluded with a prayer for relief. In consequence of this petition, a decree was passed, declaring *René Guiné* (captain) guilty of the crime of barratry of the master, for having signed false bills of lading, &c. for reparation whereof, it sentenced him to perpetual service in the galleys. It also declared *Dominique Le Grand* guilty and convicted of having been an instigator and accomplice of the said barratry of the master, and adjudged him to five years servitude in the galleys: and also decreed, that the said *René Guiné* and *Le Grand* should pay to the plaintiffs the amount of their loss, and all charges and costs. The question on this case is, Whether the plaintiffs were entitled to recover against the insurers? After the first argument,

Lord *Mansfield* said, "that with regard to the sentence which had been passed abroad, and which had declared the master and owner to have been guilty of barratry, it was entirely out of the question. That though it was a most righteous judgment, yet that it was no part of the consideration of the court there, what was meant by barratry in an *English* policy. The question was left entirely open. That their idea of barratry was manifestly different from the construction put upon that word in our own courts, for they had found the owner guilty of barratry, which was entirely repugnant to every definition of barratry, which had ever been laid down in an *English* court of justice."

A few days afterwards the court declared, that they had not the smallest doubt as to the present question, and therefore thought it very unnecessary to hear a second argument.

Lord *Mansfield* delivered the opinion of the court.

All questions upon mercantile transactions, but more particularly upon policies of insurance, are extremely important, and ought to be settled. The general question here is on the construction of the word *barratry* in a policy of insurance. It is somewhat extraordinary that it should have crept into insurances, and still more, that it should have continued in them so long; for the underwriter insures the conduct of the captain, whom he does not appoint, and cannot dismiss, to the owner, who can do either. The point to be considered is, Whether barratry, in the sense in which it is used in our policies of insurance, can be committed against any but the owners of the ship? It is clear, beyond contradiction, that it cannot; for barratry is something contrary to the duty of the *master and mariners*, the very terms of which imply, that it must be in the relation in which they stand to the *owners of the ship*. The words used are *master and mariners*, which are very particular. *An owner cannot commit barratry*. He may make himself liable by his *fraudulent conduct* to the owner of the goods, but not *as for barratry*. And, besides, barratry cannot be committed against the owner, *with his consent*: for though the owner may become liable for a civil loss by the misbehaviour of the captain, if he consents, yet that is not *barratry*. Barratry must partake of something criminal, and must be committed *against the owner* by the *master or mariners*. In the case of *Vallejo and Wheeler*, the court took it for granted, that barratry could only be committed against the owner of the ship. The point is too clear to require any further discussion.

The *possea* was delivered to the defendant.

It is clear that if the owner be also the master of the ship, any act, which in another master would be construed barratry, cannot be so in him; because such doctrine would militate against one of the rules laid down in a former part of this chapter; namely that no man shall be allowed to derive a benefit from his own crime, which he would do, were he to recover against the insurer for a loss, occasioned by his own act. But where the person, who acts as master of the ship, is proved to have carried her out of her course for fraudulent purposes of his own, that is *prima facie* evidence of barratry, so as to entitle the assured to recover against the underwriter, without requiring him to prove *negatively* that such captain was not the owner, or shewing who really

Ross v.
Hunter.
4 Term Rep.
31. See
ante, p. 120.

C H A P. V. really was so. The fact of his being owner must be established by the underwriter, in discharge of whom it is to operate.

This rule respecting the same person being both owner and master has been extended in the Court of Chancery to a case, where such an owner and master, after mortgaging his ship, had committed barratry; and when the mortgagee brought an action at law against the insurer to recover damages for the loss which he had sustained by this act of barratry, the court still considering the mortgagor as the owner, granted an injunction.

Lewin v. Suasso, Chancery, 16 Geo. II. Postlethw. Dictionary, 2 vol. 147.

The facts of that case were these. The plaintiff in equity, having been sued at law upon a policy of insurance against the barratry of the master, which was also the loss assigned in the declaration, brought his bill in Chancery to be relieved, and for an injunction. The voyage insured was from *London* to *Marseilles*, and from thence to some port in *Holland*. The master sailed with the ship to *Marseilles*, and then, instead of pursuing his voyage, sailed to the *West Indies*, where he sold his ship, and died insolvent. The plaintiff by his bill suggested, that *Matthews* the master; was also the owner of the ship: that he had, before the voyage, entered into a bottomry bond to the defendant for 200*l.* and afterwards, by a bill of sale, had assigned over his interest in the ship to the defendant, as a security for the 200*l.*: that *Matthews* was nevertheless, in equity, to be considered as owner of the ship, though in law the ownership and property would be looked upon to be in the defendant; and that the owner of a ship could not, either in law or equity, be guilty of a barratry concerning the ship; and therefore he prayed an injunction, and that the policy might be delivered up. The matters of fact being confessed by the answer, an injunction was moved for on the principle, that a mortgagor is to be considered in equity as the owner of the thing mortgaged; and that *Matthews*, the master, being owner, could not be guilty of barratry.

Lord Hardwicke.—"Barratry is an act of wrong done by the master against the ship and goods; and this being the case of a ship, the question will be, Who is to be considered as the owner? Several cases might be put, where barratry may be assigned as the breach of an insurance; and barratry or not, is a question pro-

properly determinable at law : but in this case it is not so, for courts of law will not consider a mortgagor as having any right or interest in the thing mortgaged ; and a man may frequently come into equity for relief in respect of a part only of his case. It might, indeed, be considered at law, whether what the master has done, whether he be owner or not, did not amount to a breach of contract as master, and so to a barratry : it may likewise be so considered in this court. But at law a defendant cannot read part of a plaintiff's answer to a bill filed against him here : the whole answer must be read, which has often been a reason for this court to interpose by injunction upon a plaint at law ; and considering the mixed nature of this case, I think an injunction ought to be granted."

Even if the parties insert in the policy that the insurance shall be upon the ship *in any lawful trade*, if the captain commit barratry by smuggling, the underwriters are answerable. For otherwise the word *barratry* should be struck out of the policy ; and most clearly the stipulation in the policy respecting the employment of the ship in a lawful trade, must mean, as was said by Lord *Kenyon* in delivering the unanimous opinion of the Court, *the trade on which she is sent by the owners*.

Havelock v. Hancil upon Denton, 3 Term Rep. 277.

Hitherto we have considered barratry, only as it affects the rights of the insurer and insured, which is certainly the material point of view in our present enquiry : but, before we come to the conclusion of this chapter, it will be proper to take notice of those positive regulations, which exist in this and other countries, for the punishment of those who are guilty of some of the more heinous acts of barratry.

By the ordinances of *Middleburg, Rotterdam, and Hamburg*, if any act of barratry be committed by the master, various degrees of punishment, sometimes amounting even to death, are inflicted upon him, proportioned to the enormity of his guilt.

2 Mag. 77. 112. 215.

We do not find that any punishment was expressly provided, by the law of *England*, for offences of this nature, till the reign of *Queen Anne*, at which time, as may be collected from the

C H A P.
V.

preamble of the statute, the wilful casting away, burning or destroying of ships by the master or mariners, was become very frequent.

1 Anne, stat.
2. c. 5. f. 4.

"To prevent these evils that statute ordains, " that if any captain, master, mariner, or other officer belonging to any ship, " shall wilfully cast away, burn or otherwise destroy the ship, " unto which he belongeth, or procure the same to be done to " the prejudice of the owner or owners thereof, or of any merchant or merchants that shall load goods thereon, he shall " suffer death as a felon."

4 Geo. I.
c. 12. f. 3.

Upon trial this act was found not to be sufficiently extensive; and therefore, by a subsequent statute, it was declared, " that if " any owner of, or captain, master, mariner, or other officer " belonging to any ship, shall wilfully cast away, burn, or " otherwise destroy the ship of which he is owner, or unto " which he belongeth, or in any manner direct or procure the " same to be done, to the prejudice of any person or persons " that shall underwrite any policy or policies of insurance thereon, or of any merchant or merchants that shall load goods " thereon, he shall suffer death."

11 Geo. I.
c. 29. f. 6.

By a subsequent statute it was afterwards enacted, " that if " any owner of, or captain, master, officer, or mariner belonging to any ship or vessel, shall wilfully cast away, burn, or " otherwise destroy the ship or vessel of which he is owner, or " to which he belongeth; or in any wise direct or procure the " same to be done, with intent or design to prejudice any person " or persons that hath underwrote, or shall underwrite any policy " or policies of insurance thereon, or of any merchant or merchants that shall load goods thereon, or of any owner or owners " of such ship or vessel, the person or persons offending therein " being thereof lawfully convicted, shall be deemed and adjudged a felon or felons, and shall suffer, as in cases of felony, " without benefit of clergy."

7th Section.

The following section directs, that if the offence be committed within the body of a county, the same shall be tried as all felonies are in the common law courts: but if upon the high

high seas, then to be tried agreeably to the directions of the CHAP.
28 H. 8. c. 15. V.

These are the only positive regulations, known to the law of *England*, for the punishment of those who wilfully destroy ships to the prejudice of such persons as are interested in their preservation.

CHAPTER THE SIXTH.

Of Partial Losses, and of Adjustment.

CHAP.
VI.

2 Burr.
1170.

HAVING, in the preceding chapters, treated fully of the different kinds of losses, for which the underwriters are answerable, the subject naturally leads one to consider, when losses shall be said to be total, and when partial or *average*, as they have been most commonly denominated. When we speak of a total loss, we do not always mean to signify, that the property insured is irrecoverably lost or gone: but that, by some of the perils mentioned in the policy, it is in such a condition, as to be of little use or value to the insured, and so much injured, as to justify him in abandoning to the insurer, and in calling upon him to pay the whole amount of his insurance, as if a total loss had actually happened. But the idea of a total loss, in this sense of the word, is so intimately blended and interwoven with the doctrine of abandonment, that it will add much to clearness and precision, to refer what may be said on this subject, till we come to the chapter on abandonment. In this place it will be sufficient to remark, that in case of a total loss, properly so called, the prime cost of the property insured, or the value mentioned in the policy, must be paid by the underwriter; at least, as far as his proportion of the insurance extends. This is evident from the nature of the contract: for the insurer engages, as far as to the amount of the prime cost, or value in the policy, that the thing insured shall come safe: he has nothing to do with the market; he has no concern in any profit or loss which may arise to the merchant from the sale of the goods. If they be totally lost, he must pay the prime cost, that is, the value of the thing he insured, at the *outset*: he has no concern in any subsequent value. So likewise, if part of the cargo, capable of a several and distinct valuation at the outset, be totally lost; as if there be one hundred hogheads of sugar, and ten happen to be lost, the insurer must pay the prime cost of those ten hogheads, without any regard to the price, for which the other ninety may be sold. Thus much at present for total losses.

The

The subject of this and the following chapter, seems to be of all others the most intricate and perplexing, in the whole law of insurance; an intricacy, which arises from several causes. In the first place, the subject of average has very seldom fallen under the cognizance of courts of judicature in this country; consequently there are very few adjudged cases to be found. In this scarcity of settled principles, recourse must be had to the writers of foreign nations, and to such of our own as have written upon commerce in general: but the research is by no means attended with satisfaction, much less with conviction. Another source of perplexity upon this subject is, the irregularity and confusion, which we meet with, in the present form of policies of insurance. Ambiguities frequently arise in them, by using the same words in different senses; and, in no instance, is this absurdity more glaring than in the use of the word *average*. This word in policies has two significations; for it means "*a contribution to a general loss*:" and it also is used to signify "*a particular partial loss*." In commercial affairs, indeed, it has no less than four different meanings: and therefore it cannot be wondered at, if much confusion of ideas has arisen upon the subject. In order to prevent that, if possible, in the subsequent part of this work, I shall here endeavour to distinguish between the four different senses of the word "*average*;" and wherever I shall have occasion in future to speak of a damage arising to goods or other property, not total, except when I am reciting the words of a policy, I shall take the liberty of calling it, as I have already done at the head of this chapter, a *partial*, not an *average* loss.

CHAPTER VI.

3 Burr.
755.

When goods or merchandizes carried by sea, are thrown over-board in a storm, for the purpose of lightening the ship; the owners of the ship and of the goods saved contribute for the relief of those, whose goods are ejected, in such a manner, that all, who profited by the lightening of the ship, may bear a proportional loss of the goods, thus thrown overboard, for the common safety. This contribution is what is called general or gross average; the full discussion of which will be the business of the next chapter.

Lex Merc.
c. d. 147.

Small or petty averages are the next species; and, as these never fall upon the underwriters, I shall here set down all that is necessary upon this subject. Petty average consists in such

Magens, 72.

C. H. A. P.
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Cowel,
2 Mag. 189.
278.

charges and disbursements, as according to occurrences, and the custom of every place, the master necessarily furnishes for the benefit of the ship and cargo, either at the place of loading or unloading, or on the voyage. These charges are, lodemanage, which, as it appears by Cowel's interpreter, means the hire of a pilot for conducting a vessel from one place to another; towage, pilotage, light-money, beaconage, anchorage, bridge-toll, quarantine, river-charges, signals, instructions, passage money by castles, expences for digging a ship out of the ice, when frozen up, that it may be brought into a proper harbour; and at London, by custom, the fee paid at Dover pier. These seem to be all the articles which come under the denomination of petty or accustomed average, as well in this as in foreign countries.

Mag. 72.

For these charges, the insurers are never answerable; but one-third of the expences is borne by the ship, and two-thirds by the cargo. But in order to discharge the insurer, it must appear, that the disbursements were usual and customary in the voyage; for if they were incurred for any extraordinary purpose, or in order to relieve the ship and cargo from some impending danger, they shall then be reputed a general average, and consequently be a charge on the insurer. In lieu of these petty averages, it has become usual at some places to pay 5 per cent. calculated on the freight, and 5 per cent. more for primage to the captain.

1 Mag. 72.

Jacob's Law
Dict. title
Average.

Another species of average, in matters of commerce, is that which we are accustomed to meet with in bills of lading, "paying so much freight for the said goods, with primage and average accustomed." In this sense it signifies a small duty, which merchants, who send goods in the ships of other men, pay to the master, over and above the freight, for his care and attention to the goods so entrusted to him. This kind of average may also be laid out of the present enquiry, as it is too insignificant a charge to fall upon the underwriter.

Having thus disposed of the different kinds of average, so as to prevent a confusion of ideas, we shall now proceed to the main subject proposed, namely, what shall be considered as a partial loss? how such a loss shall be adjusted, and in what proportion it shall be paid? I said, at the beginning of this chapter, that these were questions of intricacy; and so most undoubtedly they

they formerly were; but much light has been thrown upon them by Lord *Mansfield*, in his elaborate and very learned argument in the case of *Lewis v. Rucker*; and, as that case has been frequently recognized, and has ever since been looked up to, as the rule and standard of decision upon similar occasions, I have drawn most of my ideas upon this subject from the reasoning there made use of by his lordship in delivering the opinion of the court.

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VI.

2 Burr.
1167.

Partial loss, *ex vi termini*, implies a damage, which the ship may have sustained, in the course of her voyage, from any of the perils mentioned in the policy: when applied to the cargo, it also means the damage which goods may have received, without any fault of the master, by storm, capture, stranding, or shipwreck, although the whole, or the greater part thereof may arrive in port. These partial losses fall upon the owners of the property so damaged, who must be indemnified by the underwriter. For if the goods arrive, but lessened in value through damage received at sea, the nature of an indemnity speaks demonstrably, that it can only be effected by putting the merchant in the same condition in which he would have been, if the goods had arrived free from damage.

2 Burr.
1172.

The underwriters of *London* expressly declare, as appears from a memorandum at the foot of the policy, that they will not answer for partial losses, not amounting to 3 *per cent*. This clause was introduced into *English* policies about the year 1749, having long before that time been generally used in almost all the trading countries in *Europe*; and it was intended to prevent the underwriters from being continually harassed by trifling demands. But at the same time, that they provide against trifling claims for partial losses, they undertake to indemnify against losses, however inconsiderable, that arise from a general average; because that can never happen but in cases of imminent danger, when it is for the common interest that such expences should be incurred.

Vide the
Appendix,
No. 1.

It has been observed by a very sensible merchant, who has written upon insurances, that almost all the ordinances seem deficient, in not fully explaining in what cases, and in what manner, the damage arising from a partial loss, shall be deemed to exceed 3 *per cent*. To illustrate his meaning, he states this case,

1 Mag. 73.

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Suppose, says he, a merchant has shipped 101 chests of goods, of which, on arrival, three chests are, by the sea, or by some accident, so spoiled, as to be worth nothing; if the damage be calculated as on the whole value of 101 chests, it will not exceed 3 *per cent.* and it is thought by most insurers not to be recoverable, in such a case, by the insured: especially if the insurance be made, without expressly declaring, in the policy, the particular sum insured on each chest. The foundation of this opinion is, that it is considered as one entire insurance, and not a distinct insurance on each chest.

2 Burr.
329.

This is a point, which at first view may seem to fall within a case laid down by Lord *Mansfield*. "If," said his lordship, "the cargo be totally lost, the underwriter must pay the value of the thing he insured. So, if part of the cargo, capable of a several and distinct valuation at the outset be *totally* lost; as if there be 100 hogsheds of sugar, and ten happen to be lost, the insurer must pay the prime cost of those ten hogsheds, without any regard to the price for which the other 90 may be sold." So it has been supposed in the case put by *Magers*, the three chests of goods are as capable of a distinct and several valuation, as the three hogsheds of sugar: and consequently are to be paid for, as for a total loss. But Lord *Mansfield* is putting a case merely to shew, that the market price is not at all to be considered in charging the insurer; and his lordship certainly had not in his contemplation the case put by *Magers*,

Amery v.
Rodgers.
1 Esp. R.
307.

If several articles be insured for one sum, with a distinct valuation on each, as upon ship so much, on cargo so much, and no part of the cargo be taken on board, so that the risk on that never attaches; and if the ship be lost the insured shall recover such a portion of the sum insured, as the value of the article lost bore to the value of the whole. This doctrine is illustrated by the case of an insurance on the ship *Dart*, from *St. Kitt's* to *London*, on which the defendant had underwritten 200*l.* The plaintiff had written from *St. Kitt's* to his agent in *London* to effect a policy on ship and cargo, to the amount of 5500*l.*, calculating the ship at 1500*l.* of that sum. No goods were ever loaded on board. Lord *Kenyon*, though he at first doubted, afterwards adopted the rule which the special jury assured him was established at *Lloyd's* coffee-house for settling losses of this kind, namely,

that as the policy on the cargo never attached, the assured was only entitled to recover such a porportion of the sum, which the defendant had underwritten, as the property on which the policy attached bore to the whole.

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As clearness and precision are necessary upon all subjects, and more especially upon this, it will be proper to observe, that when we speak of the underwriter being liable to pay, whether for total or partial losses, it must always be understood, that they are liable only in proportion to the sums which they have underwritten. Thus, if a man underwrite 100*l.* upon property valued at 500*l.* and a total loss happen, he shall be answerable for 100*l.* and no more, that being the amount of his subscription: if only a partial loss, amounting to 6*l.* or 7*l.* *per cent.* upon the whole value; he shall pay 6*l.* or 7*l.* being his proportion of the loss.

When a total loss happens, the insured is entitled to recover against the underwriter, as soon as he has proved the value of the thing insured: but when the value is inserted in a policy, the insurer, by allowing such insertion, has admitted the value to be as stated; and nothing remains but to prove, that the goods insured were actually on board the ship. It is only in cases of total loss that any difference exists between a valued, and an open policy; in the former case the value is ascertained; in the latter, it must be proved. But where the loss is partial, the value in the policy can be no guide to ascertain the damage: which then necessarily becomes a subject of proof, as much as in the case of an open policy.

1 Mag. 35

Vide ante,
c. 1. p. 4

When a partial loss happens, the first enquiry which naturally arises is this; for what does the insurer undertake to indemnify the owner, in case of a partial loss? To answer this question, regard must be had to the nature of the contract, between the underwriter and the merchant. What is the nature of the contract? That the goods shall come safe to the port of delivery; or if they do not, that the insurer will indemnify the owner to the amount of the value of the goods stated in the policy. Wherever then the property insured is lessened in value, by damage received at sea, justice is done by putting the merchant in the same condition (relation being had to the prime cost or value in the policy) which he would have been, if the goods had arrived

2 Burr.

1172, 1173

rived

C H A P.
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2 Burr.
1170.

3 Mag. 37.

rived free from damage; that is, by paying him such proportion of the prime cost or value in the policy as corresponds with the proportion of the diminution in value occasioned by the damage. The question then is, how is the proportion of damage to be ascertained? It certainly cannot be by any measure taken from the prime cost: but it may be done in this way. Where an entire thing, as one hoghead of sugar, happens to be spoiled, if you can fix, whether it be a third, a fourth, or a fifth worse, then the damage is ascertained to a mathematical certainty. How is this to be found out? Not by any price at the port of discharge, but it must be at the port of *delivery*, where the voyage is completed, and the whole damage known. Whether the price at the latter be high or low, it is the same thing; for in either case it equally shews, whether the damaged goods are a third, a fourth, or a fifth worse than if they had come sound; consequently, whether the injury sustained be a third, fourth, or fifth of the value of the thing. And as the insurer pays the whole prime cost, if the thing be wholly lost; so if it be only a third, fourth, or fifth worse, he pays a third, fourth, or fifth, not of the value for which it is sold, but of the value stated in the policy. And when no valuation is stated in the policy, the invoice of the cost, with the addition of all charges, and the premium of insurance, shall be the foundation, upon which the loss shall be computed (a).

This

(a) This mode of estimating the value of property on a policy of insurance was very fully considered in a case before Lord Chief Justice Lee, as I find it in a manuscript volume of his decisions, which I have had the good fortune to procure since the five former editions of this work were published.

Toite v.
The Royal
Exch. Ass.
Comp. at
Guildhall,
after T. R.
1747.

Insurance on goods on board the ship Biddy, to be valued at and there was the usual clause for abating 2*l.* per cent. in case of loss. The sum subscribed by the company was 1500*l.* On the trial of an action, upon this policy, it was admitted that the ship was lost, whereby deducting the 2*l.* per cent. 1470*l.* was to be paid by the company, if the plaintiff made out his interest to that sum; and as to the plaintiff's interest it was admitted, that he had goods on board to the value of 1211*l.* and that the premium paid the company was 259*l.* 14*s.* 6*d.* which was reckoned upon the whole 1500*l.* after the rate of 17*l.* 6*s.* per cent. (i. e. 16*l.* 6*s.* per cent. premium, and 10*s.* per cent. commission), and these two sums (*viz.* the value of the goods and the whole premium paid) amounted together to the sum of 1470*l.* 14*s.* 6*d.* which was 14*s.* 6*d.* more than the sum to be paid upon the policy. It was agreed on all sides that the plaintiff had a right to include in his interest the premium he paid on the value of his goods; but it was made a question by the defendant, whether he should include the whole premium of 259*l.* 14*s.* 6*d.* for it was said that he should not include a premium of a premium, as this was, there being first a premium on the value of the goods, and the remainder being a premium upon that premium. But it was agreed by the Chief Justice, and by several merchants, who were examined as witnesses, and

This rule of ascertaining damage, occasioned by a partial loss, seems to be fraught with so much good sense, to be so very comprehensive, and so intelligible to every understanding, that it will now be only necessary to shew, that the decided cases have been agreeable to that rule: first requesting the reader to bear in mind, what has already been mentioned, namely, that the value, upon which the foregoing calculation rests, is the prime cost of the commodity, wholly independent of the rise or fall of the market, or the schemes or speculation of the merchant.

In an action upon a policy of insurance to recover an average loss upon goods, Mr. Justice *Buller* observed, that in such cases, whether the goods arrived to a good or bad market was immaterial; for the true way of estimating the loss was to take them at the fair invoice price (*a*).

Dick and
another v.
Allen, at
Guildhall,
after Mich.
Term, 1785.

A rule having been obtained by the plaintiffs, who were the insured, for the defendant (the insurer) to shew cause, why a verdict, obtained by him, should not be set aside, and a new trial had;

Lewis and
another v.
Rucker,
2 Burr.
1167.

The court, after hearing the matter fully debated, took time to advise, and their unanimous opinion was delivered to the following effect:

Lord *Mansfield*.—"This was an action brought upon a policy, by the plaintiffs, for Mr. *James Bourdieu*, upon the goods on

and by a special jury of merchants, to be the constant practice, that a person who insures his goods is intitled to include in his interest the premium not only upon the value of his goods, but also upon the sum insured: he intends to insure to his full interest, for otherwise he would not recover his whole interest; that is, he would not receive so much as his loss was, which in the present case was on goods 1211*l.* and premium paid 25*g**l.* 14*s.* 6*d.* (in all 1236*l.* 14*s.* 6*d.*) the money to be paid by him would fall short of that sum, if the premium upon the whole 15*c**l.* was not to be reckoned.

And this case was put by the plaintiff's counsel, which bears an exact proportion to the sums in the present case.

Suppose a man has goods to the value of 80*l.* 14*s.* which he wants to insure. He pays the same premium as here, 17*l.* 6*s.* which makes his interest 98*l.* In order to secure this, it is necessary for him to insure 100*l.* then in case of loss abating 2*l.* per cent. he has his 98*l.* which is the true value of his interest. The plaintiff had a verdict.

(*) Neither does the underwriter insure against any loss that may arise from the difference of exchange. *Tobinson v. Bewick*, Sittings after Michaelmas, 34 Geo. III. 1 *Elphinstone*, p. 77.

board

C H A P. VI. board a ship called the *Vrouw Martha*, at and from *St. Thomas's Island* to *Hamburg*, from the loading at *St. Thomas's Island*, till the ship should arrive, and land the goods at *Hamburg*. The goods, which consisted of sugars, coffee, and indigo, were valued; the clayed sugars at 30*l.* per hoghead; the *Muscovado* sugars at 20*l.* per hoghead; and the coffee and indigo were likewise respectively valued. The sugars were warranted free from average (that is partial loss) under 5*l.* per cent.; and all other goods free from average under 3*l.* per cent. unless general, or the ship be stranded.

In the course of the voyage the sea water got in; and when the ship arrived at *Hamburg*, it appeared that every hoghead of sugar was damaged. The damage the sugars had sustained, made it necessary to sell them immediately; and they were accordingly sold; but the difference between the price which they brought, on account of the damage, and that which they might then have been sold for at *Hamburg*, if they had been sound, was as 20*l.* 0*s.* 8*d.* per hoghead is to 23*l.* 7*s.* 8*d.* per hoghead; (that is, if sound, they would have been worth 23*l.* 7*s.* 8*d.* per hoghead; as damaged, they were only worth 20*l.* 0*s.* 8*d.* per hoghead).

The defendant paid money into court, by the following rule of estimating the damage: he paid the like proportion of the sum, at which the sugars were valued in the policy, as the price of the damaged sugars bore to sound sugars at *Hamburg*, the port of delivery. All this was admitted at the trial; though perhaps upon an accurate computation, there may be a mistake of about 17*s.* on the money paid in. But no advantage was attempted to be taken of this slip; it was admitted, that the money paid in was sufficient, if the rule, by which the defendant estimated the loss, was right: and the only question was, By what measure or rule the damage, upon all the circumstances of the case, ought to be estimated?

To distinguish this case, under its particular circumstances, out of any general rule, the plaintiff's counsel called Mr. *Samuel Chollett*, clerk to Mr. *Bourdieu*, who proved, that upon the 15th of *February*, the time of the insurance, sugars were worth at *London* and *Hamburg*, 35*l.* a hoghead; that the proposal of a
congress

congress to be holden, and the expectation of a peace, had, on a sudden, sunk the price of sugars: that before the ship arrived at *Hamburgh*, and before he knew that the sugars had received any damage, Mr. *Bourdieu* had sent orders, that the sugars should be housed at *Hamburgh*, and kept till the price should rise above 30*l.* a hoghead: that he had many hundred hogheads of sugar lying at *Amsterdam*, to which place he had sent the like orders: that the congress not taking place, *in fact* sugars rose 25 per cent.: that what he sold of the sugars, which he had at *Amsterdam*, brought 30*l.* per hoghead, and upwards: that he might have sold these sugars at the same price, if they had been kept, according to his orders; and the only reason for which they were not kept was, because they were rendered perishable from the sea water, which had got in. Therefore, said they, the necessity of an immediate sale, and the consequence thereof, ought to be computed into the damage.

The special jury (among whom there were many sensible merchants) found the defendant's rule of estimation to be right, and gave their verdict for him. They understood the question very well, and knew more of the subject of it, than any body else present; and they formed their judgment from their own notions and experience, without much assistance from any thing that passed.

The counsel for the plaintiff, in the outset, chiefly rested upon the particular circumstances of this case. The defendant offered to call witnesses to prove the general usage of estimating the quantity of damage, when goods are injured.

I was at first struck with the argument, that the immediate necessity of selling in this case might be taken into consideration, as an exception to the general rule; and proposed that the cause might be left to the jury upon that point. But Mr. *Winn* for the defendant argued, that the necessity of selling, and the consequence thereof, ought not to be regarded: and what he said, had so much weight, that it very much changed my way of thinking.

There was nothing to sum up; but the jury asked, Whether I would give them any directions? I said, I left it to them.
 " Whether the difference between the sound and the damaged
 " sugars,

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“ sugars, at the port of delivery, ought to be the rule? or,
“ Whether the necessity of an immediate sale, certainly occasioned by the damage, and the loss thereby, should be taken into consideration?” I told them, though it had struck me at first, this might be an exception; yet what the counsel for the defendant said to the contrary, seemed to have great weight. The verdict was for the defendant; and a new trial was moved for.

No fact is now disputed; the only question is, Whether the jury have estimated the damage by a proper measure? To make this matter more intelligible, I will first state the rule, by which the defendant and the jury have gone; and then I will examine whether the plaintiff has shewn a better.

The defendant takes the proportion of the difference between sound and damaged at the port of delivery, and pays that proportion upon the value of the goods specified in the policy; and has no regard to the price in money, which either the sound or the damaged goods bore in the port of delivery. He says, the proportion of the difference is equally the rule, whether the goods come to a rising or a falling market. For instance, suppose the value in the policy to be 30*l.*; the goods are damaged, but sell for 4*l.*; if they had been sound, they would have sold for 5*l.* The difference then between the sound and damaged is a fifth; consequently the insurer must pay a fifth of the prime cost, or value in the policy, that is 6*l.*: *e converso*, if they come to a losing market, and sell for 10*l.* being damaged, but would have sold for 20*l.* if sound, the difference is one half: the insurer must pay half the prime cost, or value in the policy, that is 15*l.*

To this rule two objections have been made. First, that it is going by a different measure in the case of a partial, from that which governs in case of a total loss; for upon a total loss, the prime cost, or value in the policy, must be paid. The answer to which objection is, that the distinction is founded in the nature of the thing. Insurance is a contract of indemnity against the perils of the voyage, to the amount of the value in the policy; and therefore, if the thing be totally lost, the insurer must pay the whole value which he insured at the outset. But where a

part of the commodity is spoiled, no measure can be taken from the prime cost to ascertain the quantity of the damage sustained. The only way is to fix, whether the thing be a third or fourth worse than the sound commodity; and then you pay a third or fourth of the prime cost, or value of the goods so damaged (a).

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The next objection, with which this case has been entangled, is taken from the circumstance of the policy in question being a valued policy.

I am a little at a loss to apply the arguments drawn from thence. It is said, "that a valued is a wager policy, like *interest*. "or *no interest*; and if so, there can be no partial loss, and the insured can only recover as for a total loss, abandoning what is saved, because the value specified is fictitious."

A valued policy is not to be considered as a wager policy, or like "*interest* or *no interest*." If it were, it would be void, by the statute of 19 Geo. II. c. 37. The only effect of the valuation, is fixing the amount of the prime cost, just as if the parties admitted it at the trial: but in every argument, and for every other purpose, it must be taken, that the value was fixed in such a manner, as that the insured meant to have an indemnity only, and no more. If it be undervalued, the merchant himself stands the insurer for the rest. If it be much overvalued, it must be done with a bad view, either to gain, contrary to the 19th of George the Second, or with some view to a fraudulent loss, therefore, the insured never can be allowed to plead in a court of justice, that he has greatly overvalued, or that his interest was merely a trifle.

Vide post.
c. 14.

It is settled that upon valued policies, the merchant need only prove some interest to take them out of the 19th Geo. II.; because the adverse party has admitted the value: and if more proofs were required, the agreed valuation would signify nothing. But if it should come out in proof, that a man had insured 2,000*l.* and had interest on board to the value of a cable only; there never has been, and, I believe, there never will be a deter-

(a) In Lord Mansfield's argument, in answer to the first objection, I have taken the liberty of abridging much of what fell from his Lordship, having already inserted it, in the former part of the chapter, where I laid down the rules of decision upon this point.

C H A P. VI. mination, that, by such an evasion, the act of parliament may be defeated. There are many advantages from allowing valued policies: but where they are used merely as a cover to a wager, they would be considered as an evasion. To argue that there can be no adjustment of a partial loss upon a valued policy, is directly contrary to the very terms of the policy itself. It is expressly *subject to average*, if the loss upon sugars exceed 5 *per cent.*; and even if it were not subject to average, the consequence would be, that every partial loss must thereby become total; but only the event, to entitle the insured to recover, would not happen, unless there was a total loss. Consequently the plaintiff in this case would not be entitled to recover at all; for there is no colour to say that this was a total loss; besides, the plaintiffs have taken the goods and sold them.

In opposition to the measure the jury have gone by, the plaintiffs contend, that they ought to be paid the whole value in the policy, upon one of two grounds.

Vide *supra*,
Dick v. Allen,
p. 139.

1st, Because the general rule of estimating should be the difference between the price the damaged goods sell for, and the prime cost or value in the policy. Here the damaged sold at 20*l.* 8*s.* 8*d.* *per* hoghead; and the underwriter should make it up 30*l.* To this I answer, that it is impossible that should be the rule: it would involve the underwriter in the rise or fall of the market: it would subject him, in some cases, to pay vastly more than the loss; in others, it would deprive the insured of any satisfaction, though there was a loss. For instance, suppose the prime cost or value in the policy 20*l.* *per* hoghead: the sugars are injured; the price of the best is 20*l.* a hoghead; the price of the damaged is 19*l.* 10*s.* The loss is about a fortieth, and the insurer would be to pay above a third. Suppose they come to a rising market, and the sound sugars sell for 40*l.* a hoghead, and the damaged for 35*l.* the loss is an eighth, yet the insurer would be to pay nothing.

The 2d ground, upon which the plaintiffs contended that the 30*l.* should be made up, is, that it appears the sugars would have sold for that price, if the damage from the sea water had not made an immediate sale necessary. The moment the jury brought in their verdict, I was satisfied that they did right, in totally disregarding the particular circumstances of this case: and

and I wrote a memorandum at *Guildhall*, in my note-book, that the verdict seemed to me to be right. As I expected that the other cause upon the same point would be tried, I thought a good deal upon the question, and endeavoured to get what assistance I could, by conversing with some gentlemen of experience in adjustments. The point has now been fully argued at the bar; and the more I have thought, the more I have heard upon the subject, the more I am convinced, that the jury did right to pay no regard to these circumstances.

The nature of the contract is, that the goods shall come safe to the port of delivery, or if they do not, that the insurer will indemnify the plaintiff to the amount of the prime cost, if they arrive, but lessened in value; in order to indemnify the owner, he must be put in the same condition, in which he would have been if the goods had arrived free from damage: that is by paying such proportion or *aliquot* part of the prime cost, as corresponds with the proportion or *aliquot* part of the diminution in value occasioned by the damage.

The duty accrues upon the ship's arrival and landing her cargo at the port of delivery: the insured has then a right to demand satisfaction. The adjustment can never depend upon future events or speculations. How long is he to wait? a week, a month, or year?

In this case, the price rose: but if the congress had taken place, or a peace had been made, it would have fallen. The defendant did not insure, that there should be no congress or peace. It is true Mr. *Bourdieu* acted upon political speculation, and ordered the sugars to be kept till the price should be 30*l.* and upwards; but no private scheme or project of trade of the insured can affect the insurer; for he knew nothing of it. The defendant did not undertake that the sugars should bear a price of 30*l.* a hoghead. If speculative destinations of the merchant, and the success of such speculations were to be regarded, it would introduce the greatest injustice and inconvenience: the underwriter knows nothing of them: the orders here were given after the policy was signed. But the decisive answer is, that the insurer has nothing to do with the price; and that the right of the insured to a satisfaction arises immediately upon their being landed at the port of delivery.

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We are of opinion, that the plaintiffs are not entitled to have the price, for which the damaged sugars were sold, made up 30*l.* per hoghead: and it seems to us as plain as any proposition in *Euclid*, that the rule by which the jury have gone, is the right measure.

Le Cras v.
Hughes,
B. K. East.
22 Geo. III.
Vide post.
c. 14.

In a subsequent case, which will hereafter be mentioned for another purpose, Lord *Mansfield* said, that the case of *Lewis v. Rucker* should be the rule in all similar cases, that is, wherever there was a specific description of casks or goods: but in *Le Cras v. Hughes* the property, which consisted in various goods taken from an enemy, was valued at the sum insured, and part was lost by perils of the sea; consequently the same rule could not be adopted, on account of the nature of the thing insured. The only mode was to go into an account of the whole value of the goods, and take a proportion of that sum, as the amount of the goods lost.

Johnson v.
Sheddon
2 East's R.
581.

The rule by which a partial loss, occasioned by sea-damage, is to be ascertained, has lately undergone much discussion; and a very able and elaborate judgment was pronounced on the occasion by Mr. Justice *Lawrence*, who began that judgment by declaring, that the loss is to be estimated by the rule laid down in *Lewis v. Rucker*, that the underwriter is not to be subjected to the fluctuation of the market; that the loss, for which alone he is responsible, is the deterioration of the commodity by sea-damage; and that he is not liable for any loss, which may be the consequence of the duties or charges to be paid after the arrival of the commodity at the place of its destination. The parties agreed that the damage was to be ascertained by considering, whether the commodity was a third, a fourth, or a fifth worse; and it was also agreed, that that could only be done by the price at the port of delivery. But the only question was, whether that price was to be ascertained by the *net proceeds*, or by the *gross produce*. But the court held, that the calculation was to be made on the difference between the respective gross proceeds of the same goods when sound and when damaged, and not on the net proceeds. The main stress of the argument in favour of the judgment is this, that by taking the net proceeds as the basis of the calculation, instead of the gross proceeds, it will happen, that where equal charges are to be paid on the sound and damaged commodity, the

the underwriter will be affected by the fluctuation of the market, which he ought not to be. Thus, suppose sound goods, including all charges, sell for 600*l.* the damaged for 300*l.* let the charges on each be 100*l.*, the difference, after they are deducted, will be 300*l.* or three-fifths. But let the goods come to a fallen market with the same degree of deterioration, let the sound sell for 300*l.* the damaged for 150*l.* and deduct the charges as before, the net proceeds of the one will be 220*l.* the other 50*l.*, so the underwriter will in this case have to pay three-fourths. But as the deterioration is the same in both cases, the underwriter should pay the same, whatever be the state of the market, which he will do if the *gross* produce be taken, namely, half the valued or invoice price. Another consequence of taking the *net* produce will be, that the underwriter will be made responsible for a loss not arising from the deterioration of the commodity by *sea damage*, but for that loss which the assured suffers from being liable to pay the same charges on the sound and damaged commodity. This will be illustrated by the case put of two ships arriving with the same commodity equally damaged; one being subject to duties and charges, and the other to none: the degree of deterioration being the same, the underwriter should pay alike in both cases. Suppose then the cargoes to be deteriorated one half, and the demand and the state of the market the same, and that the goods, if sound, would sell for 1000*l.* but being damaged, for 500*l.* and the charges to be 200*l.* On those goods, where no charges are to be paid, the insurer will have to pay one half, or 50*l.* *per cent.* The goods, where charges are to be paid, being equally good with the other, will sell for the same sum, and when 200*l.* are deducted for charges, will in one case leave a *net* produce of 800*l.* in the other of 300*l.*; and thus, if the underwriter were to pay according to this calculation, he would pay five-eighths instead of four-eighths, or one half; not because the one cargo has suffered more than the other by the sea, for the supposition is that the sea-damage is the same in both; but from commodities of unequal value being subjected to equal duties and charges (a).

Since the 19th of *Geo. II.* the constant usage has been to let the valuation fixed in the policy remain, in case of a total loss,

(a) Space is not allowed to give the whole of the learned Judge's argument; therefore the reader is referred to the Report.

C H A P. VI. unless the defendant can shew that the plaintiff had a colourable interest only, or that he has greatly over-valued the goods: but a partial loss opens the policy. This custom, said Lord *Mansfield*, was introduced by Lord Chief Justice *Lee*, in a case of *M. 21 G. II. Erasmus v. Banks*: and in another case of *Smith v. Flexney*, which happened about the same period, the same rule of decision was adopted (a),

2 Mag. 228. By the ordinances of *Hamburg* it is declared, that in case of a damage to goods, the assured is not to open the damaged goods, but in the presence of the assurers or their deputies; but if time and circumstances do not give opportunity to call them, yet the goods must not be opened, but in the presence of a notary and some witnesses. I can find no such regulation in the law of insurances in *England*, nor do I understand, that any such is adopted in practice. Indeed it seems to be needless; because an assured, in order to entitle himself to recover for a partial loss, must prove by disinterested witnesses, to the satisfaction of the jury, the quantity of goods damaged in the course of the voyage. The parties may, however, insist upon being present.

Ordinances
of France,
Stockholm,
and Ham-
burgh.

Vide Ap-
pendix,
No. 1.

It will be proper here to remark that some goods are of a perishable nature; and therefore, when they are damaged by such natural and inherent principle of corruption in themselves, the underwriters, by the ordinances of most countries, are held to be discharged. The underwriters of *London* have, indeed, by express words, inserted in their policy, declared, that they will not be answerable for any partial loss, happening to corn, fish, salt, fruit, flour, and seed, unless it arise by way of a general average, or in consequence of the ship being stranded (b). This clause was introduced by the underwriters, to prevent the vexation of trifling demands, which must have arisen in every voyage,

(a) In a late case upon an insurance on a ship from *Liverpool* to the coast of *Africa*, valued at 6000*l*. it was admitted that the valuation was fair when the ship sailed, but at the time of the loss had become greatly diminished by consumption of stores and provisions. But the Court were unanimously of opinion that the rule mentioned in the text must be abided by, where there is no fraud. *Shawe v. Fekm*, 2 *East's Rep.* 109.

(b) In a late case at *Guildhall*, Lord *Kenyon* told the jury that a ship's running on some wooden piles, four feet under water, erected in *Wishbeach* river, about nine yards from the shore, but placed there to keep up the banks of the shore, and lying on such piles, till they were cut away, was a stranding within the policy, so as to subject the underwriter to an average loss on corn. The jury found accordingly. *Dobson v. Bolton*, Sittings after Easter, 1799.

on account of the very perishable nature of those commodities, which we have just had occasion to enumerate. This form was formerly used by the two insurance companies, as well as by the private insurers, till the year 1754, when a ship having been stranded, and got off again, the insured recovered a small partial loss against the *London Assurance Company*; since which period, the Companies have left out the words, "*or the ship be stranded,*" and are now only liable, in cases of a general average; but the old form is still retained by private insurers.

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Cantillon v. the London Assurance Company, cited in 3 Burr. 1553.

Upon this clause there have been several determinations, in all of which it has been uniformly held, that the underwriters can in no case be answerable for a partial loss to such commodities unless the ship be stranded: and that no loss of such commodities shall be deemed a total one, but the absolute destruction of the thing insured: for that while it specifically remains, though perhaps wholly unfit for use, no loss has happened within the meaning of this memorandum. It may also be proper to premise that *corn* is a general term, and includes many particulars; peas and beans and malt have been held to come within the meaning of the word, though rice has lately been held not to be so considered.

Mason v. Skurray. Vide post. Moody v. Surridge, Sitt. bef. Ld. Kenyon, after Hil. 1798. Scott v. Bourdillion, 2 New R. p. 213. Journu v. Bourdieu, Sitt. after Easter Term, 27 Geo. III. Wilton v. Smith, 3 Burr. 1550.

But in the Court of Common Pleas Mr. Justice *Wilson* was of opinion, that the term *salt* used in the memorandum did not include salt-petre.

An action upon a policy of insurance was brought for the recovery of 56*l.* 19*s.* 8*d.* *per cent.* being the damage received by a cargo of wheat on board the *Boscawen* insured at and from *Lancaster* to *Rotterdam*. The wheat was valued by agreement at 30*s.* *per* quarter. The policy was in the ordinary form, with the usual clause at the bottom, that corn, fish, fruit, &c. should be warranted free from average, unless general, or the ship be stranded. The defendant underwrote this policy for 100*l.* The defendant having pleaded the general issue, the cause came on to be tried; and a special case was reserved for the opinion of the Court, stating, that after the ship's departure from *Lancaster*, and before her arrival at *Rotterdam*, she met with a violent storm: that she was, by and through the force of winds and stormy weather, obliged to cut away, and leave her cable and

anchor,

C H A P. VI. anchor, for the safety of the ship and cargo: that she was also greatly damaged and obliged to run to the first port to refit: that the expence of refitting the ship amounted to 38*l.* 15*s.* *per cent.* which the defendant in this case had paid, being a general average. The case then states, that the hatches were not opened at *Liverpool* (the place where she had gone to repair); but the ship, being refitted, proceeded on her voyage, and arrived at *Rotterdam*, where her cargo of wheat was landed: that upon her unloading it, it appeared that it had received partial damage by the said storm to the amount of 56*l.* 19*s.* 8*d.* *per cent.*

The single question was, upon the true construction and meaning of the words, "*free from average, unless general, or the ship be stranded,*" whether the plaintiff, as there had been a general average, could under the circumstances recover in this action for the damage of 56*l.* 19*s.* 8*d.* *per cent.* partial average, though the ship had not been stranded. After two arguments, the Court gave judgment for the defendant.

Lord Mansfield.—"Policies of insurance, according to their present form, are very irregular and confused: an ambiguity arises in them from using the same words in different senses; particularly, in the use of the word *average*. It is used to signify a contribution to a general loss; and it is also used to signify a particular partial loss. But whether it be considered in one, or other of these senses, it will not avail the plaintiffs in this case. For if it here signify *contribution*, the insurer is to be free from contribution, unless the contribution be general. If it signify *loss*, then plainly it is warranted free from all particular losses. The insurer is liable to all losses arising from the ship being stranded; and in all cases, where there is a general average: but all other partial losses are excluded by the express terms of the policy.

The word "*unless*" means the same as "*except*;" and never can be construed as a condition, in the sense that the counsel for the plaintiffs would put upon the word "*condition*," namely, to be free from partial loss, unless in two events, *viz.* a general average, or the stranding of the ship: but if either of those events did happen, then to be liable to all other average. The words "*free from average unless general,*" can never mean to leave the insurer liable to any particular damage. It is clear then

then that the plaintiff ought not to recover; and that judgment ought to be given for the defendant." CHAP.
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A question has arisen upon the construction of the memorandum. It was an action brought upon a policy of insurance to recover against the underwriters for a total loss of the cargo upon a voyage at and from *St. John's Newfoundland*, to her port of discharge in *Portugal*. The jury found a verdict for the plaintiff, subject to the opinion of the Court upon a special case. Cocking v.
Fraser, B.R.
25 Geo. III.
Vide ante,
p. 24.

The case states, that the ship sailed from *Newfoundland* on the 2d of *December* 1783, with a cargo of fish: that on the 11th they hove overboard 40 quintals for the general preservation of the ship and cargo: that on the 20th, they threw over 26 quintals more for the same purpose. The ship had exceeding bad weather, till her arrival at *Lisbon*, on the 10th of *January* 1784, when a survey was had at the request of the captain, who was also the consignee of the goods, by the Board of Health; and it appeared to them, and so the fact was, that the cargo was rendered of *no value* through the dangers of the sea. The ship did not proceed from *Lisbon* upon her destined voyage. The defendant has paid into court the amount of the partial loss sustained by the ship, and also the general average upon the cargo (a).

Lord Mansfield.—“Most litigations arise from improper statements of cases, and from not properly defining terms. This clause relative to fruit and fish, is now a very old one in policies of insurance. The insurer undertakes for all losses, except particular damage, unless the ship be stranded: he engages against a total loss. What is a total loss? The total loss of the thing insured is the *absolute destruction* of it, by the wreck of the ship. The fish may all come to port; though, from the nature of the commodity, it may be damaged, it may be stinking: still as the commodity *specifically* remains, the underwriter is discharged.”

The other judges concurred, Mr. Justice Buller observing, that from the first introduction of the clause in the year 1749, till the present time, the underwriter never has been held answerable for

(a) I have had an opportunity lately of stating the facts of this case correctly from the paper-book of one of the learned judges who decided it. See my observations at the end of the case.

C H A P. VI. total losses, but in cases where there has been a total loss of the commodity.

The case of *Cocking v. Frazer* has had many observations made upon it, and it has been supposed by very able judges to have gone too far. Lord *Kenyon*, in the case of *Burnett v. Kensington*, (post. 158.) said, "that he could not subscribe to the dictum of Lord *Mansfield*, in *Cocking v. Frazer*, that if the commodity specifically remain, the underwriter is discharged." And Lord *Alvanley*, in delivering his opinion in *Dyson v. Rowcroft*, (post. 153.) supposes himself at liberty to consider the case of *Cocking v. Frazer* as something less strong than it appears to be, in consequence of what fell from Lord *Kenyon*. But with the greatest possible deference to both these very learned judges; there is nothing objectionable in the doctrine laid down in *Cocking v. Frazer*, if the circumstances of that case, and to which circumstances alone Lord *Mansfield's* doctrine is applicable, are considered. In the case of *Cocking v. Frazer* there was no stranding, as in *Burnett v. Kensington*; there was no disability in the ship to proceed to her destination, as in *Dyson v. Rowcroft*, which, therefore, created a total loss of the voyage. In *Cocking v. Frazer* it is most evident, nothing being stated to the contrary, that the reason why the ship did not proceed to her port of destination was because the cargo was of *no value* through perils of the sea; this, therefore, was a voluntary, and not a compulsory abandonment of the further prosecution of the voyage, which will not, therefore, warrant an abandonment as for a total loss, nor could the assured recover as for partial loss, because the cargo was one enumerated in the policy. Mr. Serjeant *Marshall*, in his Treatise on the Law of Insurance, has made this clear, for he has said, "*therefore* the ship did not proceed to *Figara*." Since I published the fifth edition of this work, I have been favoured by a learned judge now living, with the paper-book of one of the learned judges who decided the case of *Cocking v. Frazer*, and neither the special case, nor does my private note contain the word *therefore*: but it is quite apparent that the above learned author has only inserted as a consequence, what every body must discover to be so, in sense and reason. I have ever understood it to be due to every judge, to take his words with reference to the case before him, and not to state his doctrine in

Marshall,
2d edit. 228.

in the abstract, or as a general proposition without allusion to the particular circumstances of the case then in judgment. Looking at the case of *Cocking v. Fraser*, in this view, Lord Mansfield's doctrine is no more than this: "If the commodity (being one of the enumerated cargoes) specifically remain, though it may be so damaged as to render it, on that account, the subject of total loss, if it had not been included in the memorandum, the underwriter is discharged, because there has neither been a stranding, nor has the voyage of the ship been put an end to by any of the perils mentioned in the policy, but because the assured did not chuse, on account of the state of the cargo, to proceed to the port of destination." The wisdom of such a decision is apparent, for otherwise it would be a constant temptation to the assured, whenever a cargo of this description was not likely to reach the port of destination in a sound state, by giving notice of abandonment, to throw a loss upon the underwriters, by voluntarily giving up the further prosecution of the voyage, to which they are not liable by the terms of the memorandum.

On such grounds as these, I conceive, it was that the case of *Dyson v. Rowcroft* was decided. It was an action on a policy on fruit on board the ship *Tartar*, at and from *Cadiz* to *London*, with the usual memorandum. The plaintiffs were interested in the fruit. The *Tartar* failed upon the voyage insured with the fruit on board: but having met with tempestuous weather and contrary winds, was forced to put into *Palma*, and afterwards into *Santa Cruz*. In the course of this voyage the fruit received so much damage from the sea-water, that, on its arrival at *Santa Cruz*, it was rotten and stunk to so great a degree, that the government prohibited the landing it, and it was, therefore, thrown overboard. The ship also was so much damaged in the course of the voyage, as to be unable to proceed upon the voyage, and was necessarily sold. On this special case, the question came before the Court.

Dyson and
others v.
Rowcroft,
3 Bosc. &
Pull. 474.

Lord Alvanley.—"If I understand the policy, as restrained by the memorandum, the underwriter agrees, that all commodities shall arrive safe at the port of destination, notwithstanding the perils insured against; but that he will not be liable to pay for any partial loss on fish, or the other articles contained in the memo-

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memorandum, because those commodities being liable to deterioration, from many circumstances independant of the peril insured against, he would continually be harassed with claims for partial loss alleged to have arisen from the perils mentioned in the policy. Unless, therefore, the consequence of the damage sustained be the total loss of the commodity, the underwriter does not agree to be answerable; but if the commodity be totally lost to the assured, he undertakes to pay. If this be not the meaning of the memorandum, it is badly expressed; and the underwriters would have done better if they had said, that they would not be answerable, unless the commodities enumerated actually went to the bottom. The question is, What is a total loss? I admit that the circumstances of cases like the present are generally suspicious. If the voyage be protracted, deterioration necessarily takes place; and it becomes the interest of the captain and mariners to turn the injury into a total loss. But this is a matter for the consideration of a jury. We ought, indeed, to look at the case with some suspicion, where there is so much temptation to throw the cargo overboard. But here it is found that the necessity of so doing arose from sea-water shipped during the course of the voyage; and that the commodity was in such a state, that it could not be suffered to remain on board consistently with the health of the crew. In consequence of this necessity, therefore, the commodity was annihilated, by being thrown overboard. Had it not been so annihilated it would have been annihilated by putrefaction: and is it not as much lost to the assured, by being thrown overboard, as if the captain had waited until it had arrived at complete putrefaction? The case of *Cocking v. Frazer* was the only thing which raised any doubt in my mind, and it is certainly a very strong case. But the authority of that case is much shaken by the observation of Lord *Kenyon* upon it, in *Burnett v. Kensington*. I suspect that the words "of no value," applied to the cargo in the case of *Cocking v. Frazer*, are somewhat too large, and that the fact was, not that the cargo was in such a situation as to make it impossible to preserve it, but that it was so much damaged as to be no longer valuable to the owners, because it was not worth carrying to the port of destination. Lord *Kenyon*, speaking of *Cocking v. Frazer*, says, that he cannot subscribe to the opinion there given, that "if the commodity specifically remain, the underwriter is discharged." I think myself, there-
fore,

fore, at liberty to consider the case of *Cocking v. Frazer*, as something less strong than it appears to be. The question then is, Whether the loss, which has happened, be not as much a total loss as if the waves had carried the cargo overboard, or, as if it had been directly prevented from arriving at the port of destination, by some of the perils insured against? I never have understood that the underwriters insure fish against no perils, which do not end in a total annihilation of the commodity. When the loss arises from capture the commodity remains in existence in the hands of the enemy; and yet this loss is as much within the policy as a loss arising from the wreck of the ship. I must now take it, that the circumstances, under which the cargo in this case stood, were such that sea-damage had so operated as to make it impossible for the captain to keep it any longer on board. Whether the cause of the loss were direct or indirect, it produced a total annihilation of the commodity." The other judges concurred, and there was judgment for the plaintiffs.

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Nor is the substance of Lord *Mansfield's* doctrine, in *Cocking v. Frazer*, very different from what fell from Lord *Kenyon* in the following case.

For in an insurance on fruit from *Lisbon* to *London*, it appeared that the ship was captured, and re-captured, brought into *Portsmouth*, and afterwards arrived at *London*; but the cargo, by the capture, re-capture, and consequent length of the voyage, had sustained a damage of 80*l. per cent.* The assured, however, never heard of the capture till the ship was safe at *Portsmouth*, and then he offered to abandon.

M^r Andrews
v. Vaughan,
Sittings at
G. H. after
Mich. 1793.

Lord *Kenyon*.—"As there has been no stranding, there cannot be a recovery for a partial loss. The question then is, Whether the assured can recover for a total loss? Had the plaintiff heard of the capture only, he might have abandoned: but he hears nothing of the accident till the ship is in safety. The cargo arrives at the port of destination; and though it is good for very little, yet it has invariably been held that the voyage must either be lost, or the cargo, if it be one of those mentioned in the memorandum, must be wholly and actually destroyed to entitle the assured to recover." The plaintiff was nonsuited.

And

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*Anderson v.
The Royal
Exch. Assur.
Company,
7 East, 38.*

And in another case, where the right to abandon a cargo of corn under proper circumstances was admitted, still that abandonment must be made in a reasonable time, while the loss continues total in its nature. But the assured must not, instead of abandoning, take to the cargo nearly during a month, and work it as upon his own account, and does not elect to abandon till the whole cargo is nearly taken out, and finds it will not answer to keep it. This was a case of stranding; but the underwriters in this company are only liable in case of total losses, or where the average is *general*, leaving out the clause respecting a stranding of the ship.

*Nesbitt v.
Lushington,
4 Term Rep.
783.*

The effect of the memorandum has been also very recently discussed by the whole Court, in an action on a policy on *wheat* and coals, the declaration stating the loss to be by *detention*. It appeared in evidence that the ship was forced by stress of weather into *Elly* harbour in *Ireland*, and there happening to be a great scarcity of corn there at that time, the people came on board the ship in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which she drove upon a reef of rocks, where she was stranded, and they would not leave her till they had compelled the captain to sell all the corn (except about 10 tons) at a certain rate. The 10 tons were lost in consequence of the stranding, by which it was damaged, and obliged to be thrown overboard. The ship afterwards arrived with the rest of the cargo at the place of destination. A verdict was found as for a total loss. A motion was made for a new trial. There were other points in the cause, one of which has been already considered. As to this upon the memorandum,

*See ante,
p. 103.*

Lord *Kenyon* said—"This being a policy upon corn, the memorandum states that the underwriter will not be liable for any average, unless *general*, or the ship be stranded. And I am of opinion that this is not a *general average*; because the whole adventure was never in jeopardy. There is no pretence to say that the persons, who took the corn, intended any injury to the ship or any other part of the cargo but the corn, which they wanted in order to prevent their suffering in a time of scarcity. Therefore the plaintiffs could never have called on the rest of the owners

owners to contribute their proportion, as upon a general average. On the meaning of the memorandum I have no doubt. The articles there enumerated are of a perishable nature : as it might be difficult to ascertain whether their being damaged arose from any accident, or from the nature of the articles themselves, this memorandum is inserted in all policies, to prevent disputes; and by it the underwriters expressly provide they will not pay any average, unless general, or the ship be stranded. When a ship is stranded, then the underwriters agree to ascribe the loss to the stranding, as being the most probable occasion of the damage, though that fact cannot always be ascertained. Therefore here all the damage done to the cargo thrown overboard may be ascribed to the stranding; but the objection is, that the declaration imputes the loss to another cause."

Mr. Justice *Buller*.—"With respect to the objection, that this does not fall within the reason of the memorandum, there are only two instances, in which the owner may recover an average loss on the articles there enumerated; either where the average is general, or where the loss arises from the stranding of the vessel. Now this cannot be said to be a general average, for the reasons already given. And as to the other instance of stranding, the plaintiffs are entitled to recover for any loss occasioned to the cargo in consequence of the stranding, provided it be a direct and immediate consequence of stranding: but they cannot recover for that which was taken by the mob; for that was not the consequence of the stranding, but on the contrary, the stranding was occasioned by the mob coming on board for the corn. The rioters took possession of the ship in order to get at the cargo: but this loss cannot be ascribed to the stranding. Suppose the mob had taken out 100 quarters of corn before the ship had been stranded, and had used no threat to destroy the whole, if it were not delivered to them, it is clear that the underwriters would not be liable. Then the fact of their taking the corn after she was stranded is as much unconnected with that circumstance as if it had been before. But the loss which happened to that part of the cargo which was thrown overboard, being ascribable to the stranding, and being a direct and immediate consequence of the peril insured against, might have

C H A P. VI. have been recovered, had there been any count in the declaration applicable to a loss by stranding."

Bowring v.
Elmdie,
Sitt. after
Trin. 1790.

Still it remained a question, which has been much agitated in *Westminster Hall*, whether the words *unless stranded* were to operate as a condition, so as to allow the assured to recover for a partial loss of the commodity, if that event happened, though it could be shewn demonstrably that no part of the loss had arisen immediately from the act of stranding. Lord *Kenyon*, in a case before him at *Nisi Prius*, upon this subject, had been of opinion, that as the general mode of construing deeds, to which there are exceptions, was to let the exception controul the instrument, as far as the words of it extend, and no further; and then upon the case being taken out of the letter of the exception, the deed operates in its full force; so the stranding of the ship put fish in the same condition as any other commodity not mentioned in the memorandum: for otherwise there would be very considerable difficulty in ascertaining how much of the loss arose by the perils insured against, and how much by the perishable nature of the commodity, which was the very thing the memorandum intended to prevent.

Burnett v.
Kensington,
7 Term Rep.
220.

This point, however, still remained in doubt, till the famous cause of *Burnett v. Kensington*, which was as much discussed as any case that ever arose at *Guildhall*, and which, after three trials by jury, and two special arguments upon the case reserved at the last of those trials, was at last unanimously decided by the whole Court, in favour of the assured. It was an insurance on fruit, the policy containing the usual memorandum, and the declaration stated the loss to be that the vessel by perils of the sea was *stranded*, bulged, and destroyed, whereby the goods were lost. The case stated that the vessel in the course of her voyage struck upon a sunken rock, on which she did not remain, but in consequence of it, several of her planks were started, and the water immediately flowed into the hold and over the cargo: that on the same day she was *stranded* at *Scilly*, by direction of the pilot for the preservation of ship and cargo. While she continued on the beach the water again flowed in over the cargo, which was very much damaged, and a small part was left at *Scilly* as wholly unfit for use. *The ship received no damage in consequence*

consequence of the stranding. The damage she received was entirely from the rock, on which she struck: part of the damage the cargo received was occasioned by the water flowing into the ship, previous to her being laid on the beach, and part was occasioned by the water that flowed in afterwards; but the cause of the water flowing in arose entirely from the ship striking on the rock, and not from any mischief done to the ship by the stranding. After full argument, and consideration of all the cases,

Lord *Kenyon* said—"The words of this policy are in general terms, including all cases; then comes this memorandum, "corn, fruit, &c. unless general, or the ship be stranded." This therefore lets in a general average; and I do not know how to construe the words grammatically, but by saying that if the ship be stranded, then it destroys the exception, and lets in the general words of the policy. If a general provision be made in any deed or instrument, and it is there said that certain things shall be excepted, unless another thing happen which gives effect to the general operation of the deed, if that other thing do happen, it destroys the exception altogether. My two opinions that have been referred to, the one in the *Nisi Prius* case, and the other in *Nesbitt v. Lushington*; have no weight with me as judicial authorities; but I confess I have not been able to extricate my mind from the reasoning that led me to the conclusion in those cases. Without inquiring into the reasons for introducing this exception, on the grammatical construction of the whole I have no doubt." His lordship then went into a consideration of the cases of *Cantillon v. The London Assurance Company*, *Wilson v. Smith*, and *Cocking v. Fraser*; and proceeded—"If it had been intended that the underwriters should only be answerable for the damage that arises *in consequence of the stranding*, a small variation of expression would have removed all difficulty; they would have said, "unless for losses arising *by stranding*." But in the body of the policy they have insured against all losses from the causes there enumerated, which include stranding; and then follows this memorandum, the evident meaning of which is, *free from average unless general, or unless the ship be stranded*; so that if the ship be stranded, the insurers say they will be answerable for an average loss. That appears to me to be the true sense and

Bowring v. Elmstie,
supra.

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the grammatical construction of the policy ; and therefore I am bound to give the same opinion I formerly gave, not because I gave that opinion, but because I am convinced by the reasoning that led to it."

Ashhurst, Grose, and Lawrence, Justices, also delivered their opinions, and judgment was given for the plaintiff.

*Boyfield v.
Brown,
9 Stra. 1065.*

There is indeed a case in *Sir John Strange's Reports*, which seems to militate against the above decisions of *Cocking v. Fraser* and *McAndrews v. Vaughan*.

Upon the execution of a writ of inquiry before Lord *Hardwicke*, when Chief Justice, it appeared, that the defendant was an insurer to the amount of 200*l.* upon corn, the value of which was 217*l.*: that the corn was so damaged in the voyage, that it sold for 67*l.* only and the freight came to 80*l.* The question upon this case was, Whether, as the freight exceeded the salvage, this was not to be considered a total loss? The Chief Justice was of opinion, that within the reason of deducting the freight, when the salvage exceeds it; the plaintiff in this case, wherein it fell short, was entitled to have it considered as a total loss. The jury accordingly found for the plaintiff.

Upon this case, it may be observed, that it was decided prior to the introduction of the clause, upon which so much has lately been said; and consequently, such a decision can have no weight now, because the law is altered on account of the agreement of the parties. Indeed the case I am about to cite was exactly similar in circumstances to *Boyfield v. Brown*: but Lord *Mansfield* in his charge to the jury gave a very different direction, and the jury found accordingly.

*Mason v.
Skurray,
Sitting a ter
Hil Term,
1780, at
Guildhall.
Vide ante,
149.*

It was an action brought on a policy of insurance on goods, on board the *Happy Recovery*, at and from *London* to *St. Augustine*, to recover for a total loss. The cargo was *peas*, which, in a former case on the same policy, were held to fall within the general denomination of *corn*, in the memorandum at the foot of the policy*. The peas arrived at the place of destination; but

(a) But the court of Common Pleas held that *Rice* is not *Corn* within the meaning of this memorandum. *Scott v. Bourdillon*. 2 New Rep. 213.

being much damaged, the produce of them was less by about three fourths than the freight, which on account of the ship's arrival at the port of discharge, became due. The defence set up by the underwriter was, that if the goods mentioned in the memorandum arrive at the market, though a loss amounting to a total one has happened, the underwriters are not liable. Four or five witnesses conversant in settling losses upon policies being called, proved, that the usage was, in such cases, to hold the underwriters discharged.

Lord Mansfield told the jury—"This was a question of consequence, and it turned upon the general import of the exception: the witnesses examined have put it on that point; and they hold, that if the specific thing come to the port of delivery, the underwriter cannot be called on. How did this matter stand before the year 1749? When the policy was general, and operated as an indemnity, there was little difference between a total and a partial loss. His Lordship here stated the determination of *Boyfield v. Brown*, which, he observed, was prior to the clause in question. But the cases now stand upon the memorandum, which is in very general words. The question is, whether the usage has not explained the generality of the words? If it has, every man, who contracts for a policy under usage, does it, as if the point of usage were inserted in his contract *in terms*. The witnesses examined all swear it to be *understood*, that if the specific thing comes to market, the memorandum warrants the insurer to be free from any demands for an average, or partial loss." The jury found for the defendant.

The case of *Boyfield v. Brown* has certainly been overturned by this decision, which was recognized as a proper determination in the case of *Baillie v. Modigliani*, before cited, where Mr. Justice Buller said, that the case in *Strange's Reports* had been expressly over-ruled by the Court in the case of *Mason v. Skurray*.

Vide ante,
c. 2. p. 76.

When the quantity of damage sustained in the course of the voyage is known, and the amount, which each underwriter upon the policy is liable to pay, is settled, it is usual for the underwriter to endorse on the policy, "*adjusted this loss, at-so much*

"

" per

C H A P. VI. " *per cent.*" or some words to the same effect. This is called an adjustment.

Richardson
v. Anderson
Sittings after
Mich. 1805.
1 Campbell
4. note.

It has been held by Lord *Ellenborough*, that if an agent had subscribed the policy, and had authority so to do, he has also authority to sign the adjustment.

It has been determined, that after an adjustment has been signed by the underwriter, if he refuse to pay, the owner has no occasion to go into the proof of his loss, or any of the circumstances respecting it. This, it is said, has been the invariable custom upon this subject; which seems perfectly just, as the underwriter has under his hand expressly admitted, that the plaintiff has sustained damage to a certain amount. To be sure, if any fraud were discovered in obtaining the adjustment, that might be a ground for setting it aside: but supposing the transaction fair, as we must always do till proof is given to the contrary, the rule of not suffering the adjustment to be contradicted, is fair and equitable.

Hog v.
Gouldney,
Sittings after
Trin. 1745,
at Guildhall,
Beaves Lex
Mer. 310.

An action was brought by the plaintiff against the defendant, on a policy of insurance, which the latter underwrote in *November* 1743, on the ship *George and Henry*, captain *Bower*, at and from *Jamaica* to *London*, with a warranty annexed to the policy, that the ship should sail from *Jamaica* with the fleet that came out under convoy of the *Ludlow Castle* man of war. The ship sailed with the fleet under that convoy, but was damaged so much, as to oblige her to bear away for *Charlestown*, where she was condemned and broken up. The plaintiff demanded his insurance; and all the underwriters, being satisfied of the truth of the case, paid their loss, except the defendant, who went so far as to settle it, and according to the custom upon these occasions, underwrote the policy in these words, "adjusted the loss on this policy, at ninety-eight pounds *per cent.* which I do agree to pay one month after date, *London*, 5th *July*, 1745, " *Henry Gouldney*."

When the note became due, he insisted on fuller proof, particularly of the ship's sailing with convoy, and her condemnation; but as it always was the custom, after adjustment and a promise to pay, never to require any further proof, but to pay the loss; and

and Lord Chief Justice *Lee* being of opinion, that this was to be considered as a note of hand, and that the plaintiff had no occasion to enter into the proof of the loss, the jury found a verdict for the plaintiff. The same rule was pursued in the following year in another case, before Lord Chief Justice *Lee*, between *Hewitt and Flexney*.

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Beaves Lex
Merc. 308.

The words used by Lord Chief Justice *Lee* are extremely large, and perhaps the true rule upon the subject may be better collected from the two following more modern cases :

Case on a policy of insurance on ship and goods from *London* to *Shelborne*, in *Nova Scotia*. The policy had been adjusted by the defendant, at 50 *per cent.* and it was contended, that he was now bound by that adjustment. On the other hand, it was argued that the adjustment was not binding ; and that if it were, it ought to have been declared upon specially.

Rogers v.
Maylor, Sit-
tings after
Trin. 1796.
Christian v.
Combe.
2 Esp. Rep.
489. Acc.

Lord *Kenyon* said, that he did not think it necessary to declare on the adjustment specially, that it was *prima facie* evidence against the defendant ; but if there had been any misconception of the law or fact, upon which it had been made, the underwriter was not absolutely concluded by it. This turned out to be the case ; and there was a verdict for the defendant.

So in a still later case, the plaintiff went to trial, having no other evidence to produce but the adjustment ; and the witness, who proved it, swore, that doubts, soon after they had signed it, arose in the minds of the underwriters, and they refused to pay ; upon which Lord *Kenyon* said, that under these circumstances, the plaintiff must go into other evidence, which not being prepared to do, he was nonsuited. In the following term a motion was made to set aside the nonsuit, upon the ground that an adjustment was *prima facie* evidence of the whole case, and threw the *onus probandi* upon the underwriter, and that it amounted to no more than proof of the defendant's subscription to the policy.

De Garçon
v. Gabraith,
Sittings after
Trin. 1795.

Michaelmas
Term,
36 Geo. III.

Lord *Kenyon*.—" I admit the adjustment to be evidence in the cause to a certain extent ; but I thought at the trial, and still think, that when the same witness, who proved the signature of

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the defendant to the adjustment, said that doubts, soon after the adjustment took place, arose in the minds of the underwriters, as to the honesty of the transaction, and they called for further proof, the plaintiff should have produced other evidence: and that shutting the door against enquiry after an adjustment, would be putting a stop to candour and fair dealing amongst the underwriters." The rule was refused.

Marshall,
2d edit. 635.

It has been lamented that this case has not been reported in the Term Reports, it being presumed that an accurate statement of the evidence would have clearly shewn that the decision of the learned Judge at *Nisi Prius*, and afterwards of the Court of King's Bench, was correctly right; that justice was done; and that under the particular circumstances of the case, it might have been a very proper exception to the rule as laid down by Lord Chief Justice Lee. And then the learned author goes on to shew that in his opinion the case of *De Garron v. Galbraith* is not reconcilable with *Rogers v. Maylor*; nor with that candour and fairness which ought to preside in the litigation of all commercial questions.

For the omission in the Term Reports, I am not answerable: but as I was counsel in the cause of *De Garron v. Galbraith*, I can vouch for the accuracy of the statement: and being a case decided by the Court on motion, I confess it seems to me entitled to as much consideration as a case decided by a single judge, however eminent that judge may have been. Indeed, I do not see any great difficulty in reconciling the doctrine contained in the latter with that of *Rogers v. Maylor*, and *Christian v. Combe*. They all agree, that the effect of the adjustment is to throw the *onus probandi* upon the underwriter: and if, immediately after signing, doubts arise about the honesty of the transaction, and those doubts are instantly communicated, the assured ought not, with a knowledge of this, and that the same witness, who proves the adjustment, can also prove the communication of the doubts, proceed to trial upon the adjustment only, as he did in *De Garron v. Galbraith*, for then he has had the notice, which the learned author alluded to, thinks ought to be given, that the fairness of the transaction would be disputed. The only objection I ever made to the case of *Hog v. Gouldney* is, that Lord Chief Justice Lee lays down the rule too generally, being stated without

without any exception, whereas the rule does admit of exceptions. But nobody ever presumed to find fault with that decision, where it probably was not necessary to state the exceptions. But still the comparison without an exception might mislead, for a promissory note, the signature being proved, only shifts the burden of proof of fraud on the defendant. I, therefore, still think the rule respecting adjustments is to be better collected from the modern cases. And in addition to the cases heretofore decided upon the subject, I have now to bring forward the opinion of Lord *Ellenborough*, who has, as I conceive, in two very modern cases, confirmed the notion entertained by Lord *Kenyon* and the Court of King's Bench, in his time. In *Hibbert v. Champion*, the ship *Ganges* had sailed from the *Downs*, under convoy of the *Fury* sloop of war, on the 12th *December* 1805, for *Portsmouth*, and before her arrival there, was captured by a *French* privateer. The defence was, that a letter from the captain, dated 5th *December*, stating that he was to sail with the *Fury*, though received on the 6th *December* had not been communicated to the underwriter before effecting the policy, which was not done till the 12th, the broker having said only that the ship had sailed about three weeks. To this it was said, that the defendant, after reading the letter in question, with several others written subsequently, had on the 12th *March* 1806, adjusted the policy, on which adjustment the plaintiff relied, and compared it to the case of an actual payment. But

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Hibbert v. Champion, reported under the name of *Herbert v. Champion*, 1 *Campbell*, N. P. Cases, p. 134.

Lord *Ellenborough* said.—“ If the money has been actually paid, it cannot be recovered back, without proof of fraud: but a promise to pay will not, in general, be binding, unless founded on a previous liability. What is an adjustment? It is an admission, on the supposition of the truth of certain facts stated, that the assured are entitled to recover on the policy, Perhaps, if properly stamped, it might be declared on as a promissory instrument. Here it is a mere admission, and there was no consideration for the promise it is supposed to prove. An underwriter must make a strong case, after admitting his liability: but until he has paid the money, he is at liberty to avail himself of any defence, which the facts or the law of the case will furnish.” It is quite evident, that his Lordship here considered an adjustment as shifting the burden of proof from the

See *Bilby v. Lumby*, 2 *East*, 469.

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assured to the underwriter ; but by no means shutting out the latter from any ground of defence, which either the law or the facts would supply. In the particular case the jury thought the letter relied upon, would have made no difference ; but it was submitted to their consideration by Lord *Ellenborough* : and the plaintiff had a verdict.

Shepherd v.
Chewter,
1 Campbell,
N. P. 274.

The other case was where the plaintiff in an action on a policy, from *Liverpool* to *Province*, with or without letters of marque, had given in evidence an adjustment on the policy signed by the defendant, and proved that, previously to its being signed, an account had been posted up at *Lloyd's*, which the defendant must have seen, stating, *that the ship on her way out had chased every thing that she saw*, and had at last been captured in the Gut of *Gibraltar*, through the cowardice and mismanagement of the master. The defendant, when he signed the adjustment, said, it was not likely the ship should have been lost by cowardice, when the captain was killed in the engagement. On the part of the defendant it was proved, that the ship from the time of her sailing from *Liverpool* had been in the constant habit of cruising for prizes ; and, therefore, it was said to be a deviation. On the other side it was contended, that as no fraud was practised upon the defendant, when he signed the adjustment, and as the notice had informed him of the supposed deviation, it was to be considered as conclusive against him. But

Lord *Ellenborough* said, the adjustment was *prima facie* evidence against the defendant ; but it certainly did not bind him, unless there was a full disclosure of the circumstances of the case ; unless they were all blazoned to him as they really existed. Therefore if the jury should think that the defendant, by reading the notice stuck up at *Lloyd's*, had his attention drawn only to the manner in which the ship was captured, and *was not roused to the previous deviation with which he afterwards became acquainted, his liability to the assured would be discharged, notwithstanding the adjustment*. His remark, when he signed the adjustment, seems to shew, that he had then only considered the conduct of the master at the moment of the capture : and the expression of the ship having chased every thing did not of necessity imply a deviation, since from carrying a letter of marque she might be considered

Considered as at liberty to chafe, so that she continued in the line of C H A P. VI.
the voyage (a).

The spirit of this rule was adopted in an insurance upon goods on board a *foreign ship*, "the policy to be deemed sufficient proof of interest in case of loss." The defendant suffered judgment to go against him by default; and on a motion to set aside the writ of enquiry, the Court of King's Bench said, that although such a policy would be void, if made upon a ship of this country, by virtue of the statute of the 19th Geo. 2. c. 37. yet the statute did not extend to policies on foreign ships: and in this case, the underwriter, having suffered judgment to go by default, has confessed the plaintiff's title to recover; and the amount of that loss was fixed, by his own stipulation in the policy, and which he cannot now controvert.

Thelluson v. Fletcher,
Doug. 301.

Vide post.
c. 14.

One rule relative to adjustments remains still to be mentioned, which is, that if an insurer pay money for a total loss, and in fact it be so at the time of adjustment: if it afterwards turn out to be only a partial loss, he shall not recover back the money so paid to the insured. But substantial justice is done by putting him in the place of the insured, and giving him all the advantages that may arise from the salvage.

This rule was settled by the King's Bench in the year 1766. It was an action on the case for 200*l.* upon an *indebitatus assumpsit*, for so much money had and received to the use of the plaintiff. *Non assumpsit* was pleaded, and issue joined. It was brought by the insurer against the insured, to recover back what he had paid him. At the trial a case was reserved for the opinion of the Court. The facts were; that a policy had been underwritten by the plaintiff, for the insurance of any of the packet boats that should sail from *Lisbon* to *Falmouth*, or such other port in *England*, as his Majesty should direct, for one whole year, commencing the 1st of *October* 1763, and to continue to the 1st of *October* 1764, inclusive, upon any kinds of goods and merchandizes whatsoever: and it was agreed, that the goods and merchandises should be valued at the sum insured on such packet

Da Costa v. Firth,
4 Burr. 1966
post. p. 212.

• (a) I cannot close this subject without saying, that the Reporter, Mr. Campbell, has, at the close of the last case, inserted a very sensible and learned note upon the effect of an adjustment.

C H A P. VI. boat, without farther proof of interest than the policy, and to make no return of premium for want of interest, being on bullion or goods.

The case then states, that the defendant had an interest in bullion, on board the *Hanover* packet, being one of the king's packets between *Lisbon* and *Falmouth*; that on the 2d of *December* 1763, it was totally lost off *Falmouth*, in a voyage between *Lisbon* and *Falmouth*; and the loss was adjusted in writing under the policy, in the words following:—"Adjusted a loss on this policy at 100*l.* per cent. the *Hanover* packet, Captain *Sbertorn*, being totally lost at *Falmouth*. Should any salvage hereafter be recovered, the insured promises to refund to the insurer whatever he may so recover, in such proportion as the sum insured bears to the whole interest. *London*, 23 *October* 1764, for *Richard Seward*, *Michael Firth*."

The insurer paid the whole money insured, which was 200*l.* In *April* 1765, the iron trunk which contained all the bullion, was fished up; and thereby all the bullion was recovered without prejudice, and delivered to the defendant. The defendant's expence of salvage amounted to 63*l.* 8*s.* 2*d.* and deducting that sum for salvage, the nett proportion of his share came to 206*l.* 11*s.* 9*d.* The plaintiffs proportion thereof, in respect of his subscription, amounted to 48*l.* 4*s.* which was paid into court.

Vide post.
6. 14.

The question was, Whether the plaintiff was entitled to recover?

The Court held, that this was a policy of a peculiar sort; and that it was good within the exception of the 19th *George* 2. c. 37. which says, that certain policies of a particular form shall be void, except on effects from any port in *Europe*, or *America*, in the possession of the crowns of *Spain* or *Portugal*. This is a mixed policy; partly a *wager* (a) policy, partly an open one: it is a valued policy, and fairly so, without fraud or misrepresentation. Therefore the loss having happened, the insured is entitled to recover as for a total loss. The insurer agreed to the value; and cannot be allowed to dispute it. The insured has

(a) Is not this a mistake of the reporter; should not the word be *valued* and not *wager*?

received

received the money for a total loss; and there is no want of conscience in retaining it. The cases, cited at the bar, only tend to shew, that where it appears, *before* adjustment, to be but a *partial loss*, the underwriter shall pay no more than the *real* damage; the reason of which decision is, that the insured must shew the whole case as it then stood. But in the present case, there was a total loss *at the time* of the adjustment. The adjustment in this case makes an end of the question. Here is a solemn abandonment, and a solemn agreement, "that the insurers shall be content with salvage in such proportion as the sum insured bears to the whole interest." There was a total loss at the time of the adjustment (which is the same as if the damages had then been recovered in an action). Here is no sort of fraud, nor any thing that is against any law: and to refund more than in that proportion would be contrary to the underwriter's own agreement. Therefore the nett proportion only, in respect to the plaintiff's subscription after deduction of salvage, ought to be returned, and that is paid into court. The *posse* was ordered to be delivered to the defendant.

CHAPTER THE SEVENTH,

Of General or Gross Average.

C H A P.
VII.

AVERAGE, in that sense in which we are now to consider it, signifies a contribution to a general loss : but in order to satisfy the reader, it will be necessary to give a more particular description of it.

Wms. 55.

Whatever the master of the ship in distress, with the advice of his officers and sailors, deliberately resolves to do, for the preservation of the whole, in cutting away masts or cables, or in throwing goods overboard to lighten his vessel, which is what is meant by jettison or jetson, is in all places permitted to be brought into a general or gross average ; in which all who are concerned in ship, freight, and cargo, are to bear an equal, or proportional part, of the loss of what was so sacrificed for the common welfare : and it must be made good by the insurers in such proportions as they have underwritten. In the works of writers upon commercial affairs, we very often meet with the word contribution, also signifying the thing just described : and in a marine sense, average and contribution are synonymous terms.

Beawes,
147.

Birkley v.
Presgrave,
2 East, 220.
Covington v.
Roberts,
2 N.R. 378.

Mr. Justice *Lawrence* says, " all loss which arises in consequence of extraordinary sacrifices or expences incurred for the preservation of the ship and cargo, come within the description of general average. A description which Lord Chief Justice *Mansfield* adopts.

This obligation, which, by the laws of all the maritime countries in *Europe*, binds the proprietor of the goods or ship saved to contribute to the relief of those whose goods are thrown overboard, is founded on the great principle of distributive justice : for it would be hard that one man should suffer by an act, which the common safety rendered necessary ; and that those who received a benefit from that act should make no satisfaction to him who had sustained the loss.

This

This obligation, which is tacitly entered into by all who have property at sea, was introduced by the *Rhodians*. Their laws most equitably enacted, that all the property on board should contribute to this necessary and general loss; and in modern constitutions we find very little alteration in the doctrine of averages, from that established at *Rhodes*. Similar regulations were made by the laws of *Wifbuy*, and as I have already said, they are now become general. From *Molloy* we learn, that the *Rhodian* laws upon this subject were introduced into *England* by *William the Conqueror*.

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Leg. Rhod.
l. 2. art. 9.

Laws of
Wifbuy,
art. 20. l. 2.
c. 6. f. 3.

Beawes is of opinion, that in order to make the act of throwing the goods overboard legal, three things must concur.

Beawes Lex
Merc. 148.

1st, That what is so condemned to destruction, be in consequence of a deliberate and voluntary consultation held between the master and men.

2dly, That the ship be in distress, and that sacrificing a part be necessary in order to preserve the rest.

3dly, That the saving of the ship and cargo be actually owing to the means used with that sole view.

But of these the first and third propositions may be doubted, as the second point alone seems to be, all that is necessary.

It appears also, by the laws of *Wifbuy*, that in an emergency of such a nature as to justify lightening the ship, it was necessary first to consult the owner of the goods or the supercargo: but if they would not consent, the merchandize might, notwithstanding their refusal, be ejected, if it appeared necessary to the rest of the people on board; a regulation evidently founded in necessity, to prevent a sordid individual from obstructing a measure so essential to the general safety.

Laws of
Wifbuy,
art. 20.

Laws of
Oleron,
art. 8.

If the ship ride out the storm, and arrive in safety at the port of destination, the captain must make regular protests, and must swear, in which oath some of the crew must join, that the goods were cast overboard for no other cause, but for the safety of the ship and the rest of the cargo. And as the law has authorized such

Beawes, 148.
Molloy, l. 2.
c. 6. f. 2.

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Moule's
Case,
12 Co. 63.

such proceedings in case of imminent necessity, it will protect those who act *bonâ fide*, and will indemnify them against all consequences. Thus in an action of trespass against a man for throwing goods overboard, he pleaded specially, that it was done in a storm, in a case of necessity, *navis levanda causâ*; and if that act had not been done, that the passengers must all have perished. The Court held, that the plea was good, and the defendant had judgment.

It is evident, from one of the rules above stated, that there can be no contribution, without the ejection of some goods, and the saving of others: but it is not always necessary for the purpose of contribution, that the ship should arrive at the port of destination.

Ord. Lew.
14. tit. Con-
tribution;
art. 15. 16.
Ord. of
Hamburg,
2 Mag. 240.
Ord. of
Rotterdam,
2 Mag. 98.
But see page
171.

If the jettison does not save the ship, but she perish in the storm, there shall be no contribution of such goods as may happen to be saved; because the object, for which the goods were thrown overboard, was not attained. But if the ship, being once preserved by such means, and continuing her course, should afterwards be lost, the property saved from the second accident, shall contribute to the loss sustained by those whose goods were cast out upon the former occasion.

1 Mag. 56.

Magens, in his preliminary Essay on Insurances, advances a different doctrine, and contends, that if a ship be saved by throwing goods overboard, and afterwards perish by another calamity, the goods saved shall not contribute to the former loss. He puts a case to illustrate his meaning; but the ordinances above referred to, as will appear from the abstract of them in the preceding paragraph, directly contradict his positions, although he seems to have had those ordinances in view when he advanced them. It was necessary to say thus much, because the doctrines of such an useful writer are often received implicitly; erroneous opinions are adopted and confirmed, because they are not accurately examined; and the more respectable the writer is, the greater is the danger which is to be apprehended. But what is still more remarkable, in the very next paragraph to that I last mentioned, he puts a similar case, in which he admits that the goods saved ought to contribute.

1 Mag. 57.

The

The writers upon this subject have stated with much minuteness and accuracy, the various accidents and charges, that will entitle the party suffering to call upon the rest for a contribution. I doubt whether it be necessary to be so particular in this place; because, we may gather in general from the description given of average at the beginning of this chapter, that all losses sustained, and expences incurred voluntarily and deliberately, with a view to prevent a total loss of the ship and cargo, ought to be equally borne by the ship and her remaining lading. Such, for instance, is the damage sustained, in defending a ship against an enemy or pirate: such is the expence of curing, and attendance upon the officers or mariners wounded in such defence: and such also is the sum which the master may have promised to pay for the ransom of his ship to any privateer or pirate when taken^(a). A master who has cut his mast, parted with his cable, or abandoned any other part of the ship and cargo, in a storm, in order to save the ship, is well entitled to this compensation; but if he should lose them by the storm, the loss falls only upon the ship and freight; because the tempest only was the occasion of this loss without the deliberation of the master and crew, and was not done with a view to save the ship and lading. Upon the same principle it is, that by the naval laws of *Wibuy*, which in this respect, as well as in many others, have been adopted by modern states, it was declared, that when a ship arrived at the mouth of a harbour, and the master, finding that his ship was too heavy laden to sail up, was obliged to put part of the cargo into hoys and barges; the owners of the ship and of the goods that remained, were obliged to contribute, if the lighters perished. But if the ship should be lost, and the lighters saved, the owners of the goods so preserved were not to contribute to the proprietors of the ship and cargo lost. The difference is this, the lightening of the ship was an act of deliberation for the general benefit: whereas the circumstance of the lighters being saved, and the ship lost, was accidental, no way proceeding from a regard for the whole.

It is not only the value of the goods thrown overboard that must be considered in a general average; but also the value of such as receive any damage by wet, &c. from the jettison of the rest.

(a) Ransoms are now prohibited by the law of England.

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Beawes Lex
Merc. 148.

1 Mag. 64.

Beawes, 142.

Art. 56.

Ordin. of
France and
Rotterdam,
2 Magens,
96. 183.
Molloy, tit.
Average,
f. 12.

1 Mag. 56.

Beawes,
148.
Molloy, l. 2
c. 6, f. 3.

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Beawes,
150.

1 Mag. 67.

It is said, that if a ship be taken by force, carried into some port, and the crew remain on board to take care of and reclaim her, not only the charges of reclaiming shall be brought into a general average, but the wages and expences of the ship's company during her arrest, from the time of her capture, and being disturbed in her voyage. In this idea *Magens* concurs, and asserts, that such expences are allowed as average in *London* as well as elsewhere. He denies, however, and, as it seems, justly denies, that an allowance would be made under general average, for sailors' wages and victuals, when they are under a necessity of performing a quarantine, in which case the master would have been obliged to maintain and pay them, though his vessel had arrived only in ballast. But at the same time he admits, that charges occurring by an extraordinary quarantine shall be brought into a general average.

It has however been a considerable question, Whether the extraordinary wages and victuals expended during the detention by a foreign prince not at war, ought to be brought into a general average, so as to charge the underwriter? *Magens* and *Beawes* differ upon the point; the latter being of opinion that it should, the former that it should not. In *England* there is no adjudged case, nor any regulation upon the subject; and therefore, the only mode by which this and similar questions are to be decided, is to consider whether these expences were necessarily and unavoidably incurred, for the general safety of the ship and cargo.

Lateward v. Curling,
G. H. Sit-
tings after
Trin. 1776,
Vide ante,
70. 72.

Lord *Mansfield* seems to have been of that opinion in an action upon a policy of insurance on a ship. It was brought to recover the amount of wages and provisions expended during the time the ship went from *Bengal* to *Bombay* to repair. His lordship, as he has frequently done since upon similar occasions, decided against the action, being an insurance on the ship only, and the item in question being sailors' wages. But his lordship said, there may be cases, where exceptions to the general rule should be allowed; but in order to consider a case as excepted, it must be an expence absolutely necessary, and such as could not be avoided, owing to some of the perils stated in the policy.

His lordship here seems to allude to a general average; but on a point, on which no authority can be adduced, I would not chuse

thuse that Lord *Mansfield's* words should be supposed to convey an idea, which perhaps the speaker never intended. It does not become me to hazard an opinion; and therefore I shall leave it as a matter undecided; only observing, that by the ordinances of *Lewis* the Fourteenth, the charges in such a case shall be reputed general average, if the seamen be hired by the month; otherwise if by the voyage.

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Tit. Aver-
age, art. 7.

It may be proper before I close this branch of my subject, to state a paragraph, I have met with, which confirms the idea entertained by Lord *Mansfield*. "Though it must be noted," says, *Beawes*, 150. this author, "that the charges of unloading a ship, to get her
" into a river or port, ought not to be brought into a general
" average; but they may when occasioned by an indispensable
" necessity to prevent the loss of ship and cargo. As when a
" ship is forced by a storm to enter a port, to repair the damage
" she has suffered, if she cannot continue her voyage without an
" apparent risk of being lost; in which case the wages and vic-
" tuals of the crew are brought into an average from the day it
" was resolved to seek a port to refit the vessel, to the day of her
" departure from it, with all the charges of unloading, re-load-
" ing, anchorage, pilotage, and every other expence incurred
" by this necessity."

Since the first edition of this work, a question nearly similar came before the Court of King's Bench, in which Mr. Justice *Buller* quoted the above passage from *Beawes*, as also the case of *Lateward v. Curling* in the preceding page: and although the learned judge thought it then unnecessary to decide the point, here agitated, yet the leaning of his mind seemed to be in favour of the affirmative. This, however, was held by the whole Court, that where a ship is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading the cargo, and taking care of it, and the wages and provisions of the workmen hired for the repairs, become general average.

De Costa v.
Newnham,
2 Term Rep.
407.

By the antient laws of *Rhodes*, *Oleron*, and *Wifbuy*, the ship, and all the remaining goods, shall contribute to the loss sustained. The most valuable goods, though their weight should have been incapable of putting the ship in the least hazard, as diamonds or precious stones, must be valued at their just price in this contribution, because they could not have been saved to the owners

De leg.
Rhod. l. 2.
art. 8. Oler.
art. 8. Wifb.
art. 20.
Molloy, l. 2.
c. 6. l. 4.

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Vide post.
ch. 21. Joyce
v. William-
son.

but by the ejection of the other goods. Neither the persons of those in the ship, nor the ship provisions, nor respondentia bonds, suffer any estimation; nor does wearing apparel in chests and boxes, nor do such jewels as belong to the person merely; but if the jewels are a part of the cargo, they must contribute.

1 Mag. 63. Those who carry jewels by sea ought to communicate that circumstance to the master; because the care of them will be increased in proportion to their worth, to prevent their being thrown overboard promiscuously with other things: and hence their preservation will be a common benefit.

1 Mag. 71. Both by law and custom, the wages of sailors are not to contribute to the general loss; a provision intended to make this description of men more easily consent to a jettison, as they do not then risk their all, being still assured that their wages will be paid.

1 Mag. 69. The way of fixing a right sum, by which the average ought to be computed, can only be, by examining what the whole ship, freight, and cargo, if no jettison had been made, would have produced neat, if they had all belonged to one person, and been sold for ready money. And this is the sum whereon the contribution should be made, all the particular goods bearing their nett proportion.

Ord. of Ge-
non and
France.

In no respect whatever do the ordinances of foreign states differ so much, as in the manner of settling the contribution of the ship and freight. In some places, the ship contributes for the whole of her value and freight; in others, for the half of her value, and one-third of her freight: and again, in others, both ship and freight are to contribute for one-half. By the laws of *Koningberg, Hamburg, and Copenhagen*, the ship is to contribute for the whole of her value and freight. They also declare, that the value of the ship shall be that which she was worth when she arrived; and that from the freight a deduction shall be made of the men's wages, pilotage, and such other charges, as come under the name of petty average, of which it is customary every where, as we have before observed, for the cargo to bear two-thirds, and the ship one.

Vide the
last chapter.

The *Englisch* writers upon commerce are totally silent in this respect; and therefore custom must be our guide: and I think

from that we may collect, that the ship, freight (a), and cargo, are to bear an equal and proportional part of what was so sacrificed for the common good. C H A P.
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The sea laws of different countries vary no less than upon the former question, in fixing at what prices goods thrown overboard shall be estimated, and for what value those saved are to contribute.

By the ordinances of *Rotterdam*, *Stockholm*, and *Copenhagen*, if the accident, which occasioned the general average, happened before half the voyage was performed, the jettison was to be estimated at prime cost; but if after that period, then at the price for which such goods would sell, at the place of discharge, freight, duties, and ordinary charges deducted. That distinction is now, however, exploded in *England*, and the custom has become general of estimating the goods saved and lost, at the price for which the goods saved were sold; freight and all other charges being first deducted. This rule is agreeable to the marine laws of *Wisby*, which declare, that the goods thrown overboard shall be brought into a gross average, and shall be rated at the same price for which other merchandize of the same sort, preserved from the sea or enemy, was sold. This custom mentioned by *Molloy* was certainly new in *England* at the time he wrote; for it appears by *Malyne*, that in 1622, the distinction was observed of estimating the goods at prime cost, if the jettison happened before half the voyage was performed; and if after, at the price the rest of the goods sold for, at the place of discharge. However, *Molloy* is a more modern authority; and *Magens* says, that the prevailing mode of settling averages now adopted in *England* is conformable to that rule, which has abolished the distinction.

Gold, silver, and jewels, at most places, contribute to a general average, according to their full value, and in the same manner as any other species of merchandize. It has been said, that an immemorial custom has prevailed at *Amsterdam*, that gold and silver shall only contribute for half their value: the reason for such a custom, one is at a loss to conjecture. In *England* no such custom prevails; but money and jewels must fall into the

(a) It has been held by the whole court of King's Bench, that freight must contribute to the general average. *De Costa v. Newnham*, 2 Term Rep. 407.

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VII.
1 Mag. 62.

general average at their full price : and a modern writer assures us, that the practice was such in *London* when he wrote ; and such I believe it to be at this day.

Peters v.
Milligan,
Sittings at
Guildhall
after Mich.
1787.
Roccus de
Navibus,
Not. 96.
1 Mag. 60.

In a late case, the doctrine here advanced was mentioned and confirmed by Mr. Justice *Buller*, as clear law.

The contribution is in general not made till the ship arrive at the place of delivery : but accidents may happen, which may cause a contribution before she reach her destined port. Thus when a vessel has been obliged to make a jettison, or, by the damages suffered soon after sailing, is obliged to return to her port of discharge ; the necessary charges of her repairs, and the replacing the goods thrown overboard, may then be settled by a general average.

Thus I have endeavoured to lay before the reader an idea of what is meant by average ; and, in order to do that more distinctly, I have defined what average is ; I have shewn its origin ; and what the necessary requisites are to render the act, whence averages arise, legal. I then stated in general what accidents or expences would authorize the sufferer to call for a contribution ; the different kinds of property that were subject to such contribution ; and lastly, the mode by which the value of this property was to be ascertained.

Roccus de
assicurationibus, Not.
62.

It only remains now to state, that the insurers are liable to pay the insured for all expences arising from general average, in proportion to the sums they have underwritten. *Roccus* says, "*Factu facto, ob maris tempestatem, pro sublevanda navi, an teneantur asscuratores ad solvendum estimationem rerum jactarum domini ipsarum ? Dic eos non teneri, quia pro rebus jactis fit contributio, inter omnes merces habentes in illa navi pro solvendo pretio domino ipsarum, et ideo si asscuratus recuperat pretium rerum jactarum, non potest agere contra asscuratores : tamen tenentur asscuratores ad rescindendum illam ratam et portionem, quam solvit asscuratus in illam contributionem faciendo inter omnes, habentes merces in illa navi, quæ portio cum non recuperetur ab aliis, habetur pro deperdita, et proinde ad illam portionem tenentur asscuratores.*"

The opinion of this learned civilian is agreeable to the laws of all the trading powers on the continent of *Europe*, as well as to those of *England*, where the insurer, by his contract, engages to indemnify against all losses arising from a general average.

CHAP.
VII.

In former editions of this work, I had contented myself with stating the nature of general average, and that the sums paid on this account might be recovered against the underwriters. But I had omitted to state what remedy the person, whose goods were thrown overboard, or who had expended money for the general preservation of ship and cargo, had against those, whose goods or ship were preserved by such means. In the case of an expenditure of money, *probably* an action for money paid *might* be maintained against each of those, who were benefited by such expenditure. But as this would lead to a multiplicity of actions; and this species of action is not applicable to the case of goods thrown overboard, the better mode in all cases seems to be to apply for contribution to a court of equity, where effectual relief may be obtained against all the parties in one suit (a).

Com. Dig.
tit. Chan-
cery, (s 1)
and Shower's
Parl. Caf.

(a) Since the former editions of this work were published, this point has come under solemn discussion in the court of King's Bench; and the learned Judges of that court were unanimously of opinion, that a special action of *assumpsit* may be maintained by the owner of a ship against the owner of part of the cargo, to recover from him his proportion of a general average loss, incurred by cutting the cable and part of the tackle of the ship, and applying them to a use, for which they were not originally intended, for the general preservation of the whole concern. *Birkley v. Presgrave*, 1 E. 11th Rep. 220.

CHAPTER THE EIGHTH.

Of Salvage.

C H A P.
VIII.

SALVAGE is so necessarily connected with the two former chapters, that it will be proper to take it into consideration here, before we proceed to the other parts of this enquiry.

Beaves Lex
Merc. 146.

Salvage is an allowance made for saving a ship or goods, or both, from the dangers of the seas, fire, pirates, or enemies: and it is also sometimes used to signify the thing itself which is saved; but it is in the former sense only, in which we are at present to consider it.

Kaim's
Princ. of
Eq. Introd.
p. 6.

The propriety and justice of such an allowance must be evident to every one; for nothing can be more reasonable than that he, who has recovered the property of another from imminent danger by great labour, or perhaps at the hazard of his life, should be rewarded by him, who has been so materially benefited by that labour. Accordingly, all maritime states, from the *Rhodians* down to the present time, have made certain regulations, fixing the rate of salvage in some instances, and leaving it, in others, to depend upon particular circumstances.

Leg. Rhod.
l. 2. art. 45,
46, 47.

The law of *England*, the decisions of which are not surpassed by those of any other nation in justice and humanity, was not backward in adopting a doctrine so equitable in its nature, and so beneficial to those whose property was endangered.

Hartford v.
Jones, 1 Ld.
Raym. 303.
2 Salk. 654.

Thus in an action of trover, the defendants pleaded, that the goods, for which the action was brought, were in a ship, which took fire, and that they hazarded their lives to save them: but that they were ready to deliver the goods, if the plaintiff would pay 4*l.* for salvage. The court, upon a general demurrer to this plea, were obliged to give judgment for the plaintiff, because the special plea did not confess a conversion. But upon the general point, for which this case is cited, Lord Chief Justice *Holt* held that the defendants might retain the goods till payment of the salvage, as well as a taylor, an ostler, or a common carrier: and

salvage

salvage is allowed by all nations ; it being reasonable, that a man shall be rewarded, who hazards his life in the service of another. Therefore his lordship, in favour of so just a claim, allowed the defendant to waive his special plea, and plead the general issue.

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As the propriety of such an allowance is admitted by all, the only difficulty that can arise upon the subject is, to ascertain in what proportions these gratuities and rewards must be allowed.

The laws of *Rhodes* fixed the rate of salvage in several instances, sometimes giving for salvage one fifth of what was saved ; at other times only a tenth ; and at others, one half. The regulations of *Oleron* left it more unsettled, and declared, that the courts of judicature should award to the salvors, such a proportion of the goods saved, as they should think a sufficient recompence for the service performed, and the expence incurred. Almost every state has regulations on this head peculiar to itself ; and the legislature of this country has by various statutes expressed its ideas upon the subject. I shall first consider what rule it has established in cases of wreck, and then what the rate of salvage is in cases of recapture.

Vide the
passages last
cited.
Leg. Oler.
art. 4.

When a ship has been wrecked, the law of *England* has followed the laws of *Oleron* in declaring, that *reasonable* salvage only shall be allowed. But the statute will best shew the idea of the legislature.

It appears from the preamble, that the infamous practices, which a former statute 27 *Edward* 3. c. 13. had endeavoured to suppress, of plundering those ships which were driven on shore, and seizing whatever could be laid hold of as lawful prize, still continued ; or that if the property were restored to the owners, the demand for salvage was so exorbitant, that the inevitable ruin of the trader was the immediate consequence. The statute, in order to prevent those mischiefs in future, enacted, that if a ship was in danger of being stranded or run ashore, the sheriffs, justices, mayors, constables, or officers of the customs, nearest the place of danger, should, upon application made to them, summon and call together as many men as should be thought necessary to the assistance, and for the preservation of such ship in distress, and her cargo ; and that if any ship, man of war, or merchantman, should be riding at anchor near the place of dan-

12 Ann.
stat. 2. c. 12.

sect. 1.

C H A P. ger, the constables and officers of the customs might demand of
 VIII. the superior officer of such ship, assistance by his boats and such
 hands as could be spared : and that if the superior officer should
 refuse to grant such assistance, he should forfeit 100*l*.

Sec. 2.

Then follows the section respecting salvage. “ And for the
 “ encouragement of such persons as shall give their assistance to
 “ such ships or vessels, so in distress as aforesaid, be it enacted,
 “ that the said collectors of the customs, and the master and
 “ commanding officer of any ships or vessels, and all others, who
 “ shall act or be employed in the preserving of any such ship or
 “ vessel in distress, or their cargoes, shall within thirty days
 “ after the service is performed, be paid a *reasonable reward* for
 “ the same, by the commander, master, or other superior offi-
 “ cer, mariners, or owners of the ship or vessel so in distress, as
 “ aforesaid, or by the merchant whose vessel or goods shall be so
 “ saved ; and in default thereof, the said ship or vessel so saved
 “ shall remain in the custody of the officers of the customs until
 “ all charges are paid, and until the officers of the customs, and
 “ the master or other officers of the ship or vessel, and all others
 “ employed in the preservation of the ship, shall be *reasonably*
 “ *gratified* for their assistance and trouble, or good security given
 “ for that purpose, to the satisfaction of the parties that are to
 “ receive the same : and if any disagreement shall take place be-
 “ tween the persons, whose ships or goods have been saved, and
 “ the officer of the customs, touching the monies deserved by
 “ any of the persons so employed, it shall be lawful for the com-
 “ mander of the ship or vessel so saved, or the owner of the
 “ goods, or the merchant interested therein, and also for the of-
 “ ficer of the customs, or his deputy, to nominate three of the
 “ neighbouring justices of the peace, who shall thereupon adjust
 “ the *quantum* of the monies or gratuities to be paid to the sever-
 “ ral persons acting or being employed in the salvage of the said
 “ ship, vessel, or goods ; and such adjustments, shall be binding
 “ upon all parties, and shall be recoverable in an action at law :
 “ and in case it shall so happen, that no person shall appear to
 “ make his claim to all or any of the goods that shall be saved,
 “ that then the chief officer of the customs of the nearest port
 “ to the place where the said ship or vessel was so in distress,
 “ shall apply to three of the nearest justices of the peace, who
 “ shall put him or some other responsible person in possession of

" the said goods, such justices taking an account in writing of
 " the said goods, to be signed by the said officer of the customs:
 " and if the said goods shall not be legally claimed within the
 " space of twelve months next ensuing, by the rightful owner
 " thereof, then public sale shall be made thereof, and if perish-
 " able goods, forthwith to be sold, and after all charges deducted,
 " the residue of the monies arising from such sale, with a fair
 " and just account of the whole, shall be transmitted to her ma-
 " jesty's Exchequer, there to remain for the benefit of the right-
 " ful owner, when appearing, who, upon an affidavit, or other
 " proof made of his or their right or property thereto, to the sa-
 " tisfaction of one of the barons of the coif of the Exche-
 " quer, shall, upon his order, receive the same out of the
 " Exchequer *.

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The statute then goes on to declare, that any other persons, Sect. 3.
 than those mentioned in the preceding clause, endeavouring to
 enter such ship or vessel without the permission of the superior
 officer of the ship, or of the officer of the customs, &c. or mo-
 lesting or hindering them in the preservation of the ship, or
 defacing the marks of the goods on board of such ship, shall
 make double satisfaction to the party grieved, or, on default
 thereof, shall be sent to the house of correction for twelve
 calendar months: and that it shall be lawful for the officers of
 the ship to repel by force persons so endeavouring to enter with-
 out leave.

It is also enacted, that if any goods, stolen from, such ship, Sect. 4.
 shall be found on any person, they shall be delivered up to the
 true owner; or, in default, such person shall pay treble the
 value.

(a) The court of King's Bench have lately found themselves under the necessity of
 declaring that this clause of the statute, referring the quantum of damage to the award
 of three justices of the peace, only applies to cases, where application is made, by or on
 behalf of the commander of any vessel in distress to certain public officers, and where
 the salvage is made through them and others employed by them. But it has omitted
 to provide for the case of persons employed in the salvage by the owners or their ser-
 vants, where resort has not been had to the public officers. And the subsequent sta-
 tute of 26 Geo. 2. ch. 19. applies to the case of persons volunteering their assistance
 to save the property, under no employment or requisition whatever, either by the
 owners or public officers. *Baring v. Day*, 3 East's R. 57.

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Sect. 5.

The next section declares, that any person, boring holes in a ship in distress, or stealing a pump belonging thereto, shall be guilty of felony, without benefit of clergy.

This act was made perpetual by the 4 Geo. 1. c. 12; and as far as relates to our present subject, we can collect, that in cases of wreck, the rate of salvage is not fixed, but must be *reasonable*, that is, it must be a sufficient recompence to those, who have encountered dangers for the preservation of the ship and cargo, regard at the same time being had to the circumstances of the owner of the property saved: and what shall be a sufficient recompence is to be ascertained by three justices of the peace.

Notwithstanding this salutary law had passed, the enormities complained of by the statute of queen Anne still continued, to the disgrace of humanity, and a civilized people; upon which the legislature were again obliged to interpose by a subsequent statute, which I should perhaps not have mentioned, had it not contained some additional regulations respecting salvage.

26 Geo. II.
c. 19.

Sect. 1.

The statute ordains, that persons convicted of stealing goods from a ship wrecked, or in distress, or of obstructing the escape of any person from a wreck, or of putting out false lights to lead such ship into danger, shall suffer as felons without benefit of clergy. But where goods of small value shall be stolen, with-

Sect. 2.

out any circumstances of cruelty, the offender may be indicted for petty larceny. Justices of the peace, upon information of

Sect. 3.

shipwrecked goods being stolen or concealed, are empowered to issue search warrants; and the persons in whose custody they may be found, refusing to deliver them on demand, or to give a satisfactory account how they became possessed thereof, shall be committed to the common gaol for six months, or until payment of the treble value of such goods. Goods offered to

Sect. 4.

sale, suspected of being shipwrecked, are to be stopped; and notice shall be immediately given to a justice of the peace, and if the person offering the same to sale cannot make out the property to be lawfully in him, the goods shall be returned to the owner, upon a *reasonable reward for such seizure (to be ascertained*

by

by the justice): and the offender shall be committed to the common gaol for six months, or until payment of the treble value of the said goods. C H A P.
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And be it further enacted, "that in case any person or persons, not employed by the master, mariners, or owners, or other persons lawfully authorized, in the salvage of any ship or vessel, or the cargo or provision thereof, shall, in the absence of the persons so employed and authorized, save any such ship or vessel, goods, or effects, and cause the same to be carried for the benefit of the owners or proprietors, into port, or to any near adjoining custom-house, or other place of safe custody, immediately giving notice thereof to some justice of the peace, magistrate, or custom-house or excise officer, or shall discover to such magistrate, or officer, where any such goods or effects, are wrongfully bought, sold, or concealed, then such person or persons shall be entitled to a reasonable reward for such services, to be paid by the masters or owners of such vessels or goods, and to be adjusted in case of disagreement about the quantum, in like manner as the salvage is to be adjusted and paid, by virtue of a statute made in the 12th of queen Anne." Sect. 5.

Vide supra.

"And be it further enacted, that for the better ascertaining the salvage to be paid in pursuance of the present act, and the act before mentioned, and for the more effectual putting the said act into execution, the justice of the peace, mayor, bailiff, collector of the customs, or chief constable, who shall be nearest to the place where any ship, goods, or effects, shall be stranded or cast away, shall forthwith give publick notice for a meeting to be held as soon as possible of the sheriff or his deputy, the justices of the peace, mayors, or other chief magistrates of towns corporate, coroners, or commissioners of the land tax, or any five or more of them, who are hereby empowered and required to give aid in the execution of this and the said former act, and to employ proper persons for the saving of ships in distress, and such ships, vessels, and effects, as shall be stranded, or cast away; and also to examine persons upon oath, touching or concerning the same, or the salvage thereof, and to adjust the quantum of such salvage, and distribute bute" Sect. 6.

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“ bute the same among the persons concerned in such salvage, in
“ case of disagreement among the parties, or the said persons;
“ and that every such magistrate, &c. attending and acting at
“ such meeting, shall be paid four shillings a day for his ex-
“ pences in such attendance out of the goods and effects saved
“ by their care or direction.”

Sect. 7.

“ Provided always, that if the charges and rewards for salvage,
“ directed to be paid by the former statute, and by this act,
“ shall not be fully paid, or sufficient security given for the same,
“ within forty days next after the said services performed, then
“ it shall be lawful for the officer of the customs concerned in
“ such salvage, to borrow or raise so much money as shall be
“ sufficient to satisfy and pay such charges and rewards, or any
“ part thereof, then remaining unpaid, or not secured as afore-
“ said, by or upon one or more bill or bills of sale, under his
“ hand and seal, of the ship or vessel, or cargo saved, or such
“ part thereof as shall be sufficient, redeemable upon payment
“ of the principal sum borrowed, and interest for the same, at
“ the rate of 4 per cent. per annum.”

Sect. 9.

The act also declares, that the commissioners of the land-tax,
the deputy-sheriff, the coroner, and the officers of excise in each
county, shall be the proper officers for putting these acts in exe-
cution, together with those persons respectively named in the

Sect. 10.

act of queen Anne. In the Cinque Ports, however, the execu-
tion of these acts is entrusted to the lord warden of the Cinque
Ports, the lieutenant of Dover Castle, the deputy warden of the
Cinque Ports, the judge official and commissary of the court
of Admiralty of the Cinque Ports, two ancient towns, and
the members thereof, and to all and every other person and
persons appointed, or to be appointed by the lord warden of the
Cinque Ports.

Sect. 11
and 12.

The statute proceeds to say, that persons convicted of assault-
ing any magistrate or officer, when in the exercise of his duty
respecting the preservation of any ship, vessel, goods, or effects,
shall be transported for seven years; and the justices, in the ab-
sence of the sheriff, may take a sufficient force with them to re-
press

press violence. It directs in the last place, that the officer of the customs who shall act in preserving any ship or vessel in distress, or the cargo thereof, shall cause all persons belonging to the said ship or vessel, and others who can give any account thereof, or of the cargo thereof, to be examined upon oath before some justice of the peace, as to the name or description of the said ship or vessel, and the names of the master, commander, or chief officer, and owners thereof, and of the owners of the said cargo, and of the ports or places from or to which the said ship or vessel was bound, and the occasion of the said ship's distress; which examination the justices are to take down in writing, and they shall deliver a true copy thereof, together with a copy of the account of the goods to the officer of the customs, who shall transmit the same to the secretary of the Admiralty for the time being, that he may publish the same, or so much thereof in the *London Gazette*, as shall be necessary for the information of persons interested therein. This act is not to extend to *Scotland*.

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Sec. 15.

Sec. 18.

Thus anxiously has the legislature provided for the preservation of property wrecked, thereby diminishing those calamities which must unavoidably happen to all concerned in foreign commerce; and with no less anxiety and wisdom, it has appointed certain magistrates to ascertain what shall be a sufficient allowance for the salvage of a ship or goods in cases of wreck. The necessity of leaving the *quantum* to the arbitration of proper persons, to be decided according to the circumstances of each case, is obvious; because it is impossible to suppose two instances of such a calamity so similar to each other, that the trouble, danger, and expence of both shall be exactly equal. It would be contrary, therefore, to the first principles of justice to decide, that the same sum should be the allowance, or recompence for every possible case of salvage. For instance, if a ship be found adrift at sea, having been abandoned by the master and crew, it seems reasonable, that the allowance for salvage should be greater than in a case where a man merely picks up goods cast upon the shore, and carries them to a place of security. Thus much for salvage in case of a wreck.

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Vide ante,
c. 4. p. 94.

We have formerly seen, that when the ships or goods of *British* subjects were retaken from an enemy, the original owner was entitled, by the marine law, to have them restored, upon paying to the recaptors a reasonable salvage, provided the recapture was before condemnation. It was also observed, that the statute law had extended the right of the original owner; so that he was entitled to have his ship and goods restored to him, whether they were retaken after condemnation or before, however distant the time of recapture might be from that of the original taking. The statutes have also fixed the precise rate of salvage, which the recaptors shall be entitled to demand.

By the 13 *Geo. II.* ch. 4. and 29 *Geo. II.* ch. 34. Parliament fixed and ascertained the rate of salvage, in case of a recapture, proportioning the amount of the reward to the length of time the ship or goods had been in the possession of the enemy, because the longer they remained in the hands of the enemy, so much the less was the hope of recovery. At the same time, however, those statutes fixed a boundary, beyond which the allowance should not pass; namely, that in no case whatever, should the recaptors be entitled to more than a moiety of the property rescued from the enemy.

But the statutes 33 *Geo. 3.* ch. 66. s. 42. and 43 *Geo. 3.* ch. 160. s. 39. (which section see ante, p. 95.) has destroyed that proportion, and has ascertained the rate in all cases, however long the ship has been in the enemy's possession, to be one eighth, if the recapture has been made by any of his majesty's ships, and one sixth, if made by a privateer or other ship.

Beaves Lex
Merc. 147.

It is said in the statute, that the salvage shall be a proportion of the ships and goods so restored: but a writer upon mercantile law observes, that the wearing apparel of the master and seamen are always excepted from the allowance of salvage.

Beaves,
147.

The statute has also said, it must be an eighth, or a sixth, &c. of the *true value*. Now the valuation of a ship, in order to ascertain the rate of salvage, may be determined by the policy of insurance,

insurance, if there is no reason to suspect she is undervalued; and the same rule may be observed as to goods where there are policies upon them. If that, however, should not be the case, the salvors have a right to insist upon proof of the real value which may be done by the merchant's invoices, and they must be paid for accordingly.

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The only question then is, how far the insurers are affected by this allowance of salvage. By their own contract they expressly agree to indemnify the insured against such charges: "And in case of any loss or misfortune, it shall be lawful for the assured, their factors, servants, and assigns, to sue, labour, and travel for, in and about the defence, safeguard, and recovery of the said goods and merchandizes, and ship, &c. or any part thereof, without prejudice to this insurance; to the charges whereof we the assurers will contribute, each one according to the rate or quantity of his sum herein assured."

Vide the
Appendix,
No. 2.

In the case of *Mitchell v. Edie* (1 Term Reports, 608.) Mr. Justice *Abburft* said, it seemed to him, that the meaning of this clause was, that till the assured have been informed of what has happened, and have had an opportunity of exercising their own judgment, no act done by the master shall prejudice their right of abandonment.

In order to entitle the insured to recover the expences of salvage, it is not necessary to state them in the declaration, as a special breach of the policy; because an insurance is against all accidents, and salvage is an immediate and necessary consequence of some of those stated in a policy.

Thus in an action on a policy of insurance, for insuring goods on the ship *A*. the plaintiff declared, that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled: the evidence was, that many of the goods were spoiled, but some were saved. The question was, Whether the plaintiff might give in evidence, the expences of salvage, that not being particularly stated in the declaration, as a breach of the policy?

Carey v.
King, Cases
in B. R.
temp. Hard-
wicke, 304.

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Lord *Hardwicke*. — “ I think they may give it in evidence, for the insurance is against all accidents. The accident laid in this declaration is, that the ship sunk in the river : it goes on and says, that by reason thereof the goods were spoiled. That is the only special damage laid ; yet it is but the common case of a declaration that lays a special damage, where the plaintiff may give in evidence any damage that is within his cause of action. It was objected, that such a breach of the policy should be laid, that the insurer may have notice to defend it. Now it is so in this case, for they have laid the accident, which is sufficient notice, because it must of course follow, that some damage did happen.”

But although the insured may recover from the insurer the expences of salvage ; yet he shall only be entitled to an indemnity, and shall not receive a double satisfaction for the same loss. Thus if the insurer should have paid to the insured the expences arising from salvage ; and afterwards, on account of some particular circumstances, the loss should be repaired by some unexpected means, the insurer shall stand in the place of the insured and receive the sum thus paid to atone for the loss.

Randal v.
Cogran,
1 Ves. 98.

It was so determined in a case before Lord *Hardwicke* in Chancery. The king having granted general letters of reprisal on the *Spaniards* for the benefit of his subjects, in consideration of the losses they sustained by unjust captures, the commissioners would not suffer the insurers to make claim to part of the prizes, but the owners only ; although they were already satisfied for their loss by the insurers, who thereupon brought the present bill. The Lord Chancellor was of opinion, that the plaintiffs had the plainest equity that could be. The person originally sustaining the loss was the owner ; but after satisfaction made to him, the insurer becomes the owner. No doubt, but from that time, as to the goods themselves, if restored in specie, or compensation made for them, the insured stands as a trustee for the insurer, in proportion for what he paid ; although the commissioners did right in avoiding being entangled in accounts, and in adjusting the proportion between them. Their commission was limited in time ; they see who was owner ; nor was it material to them, to whom he assigned his interest, as it was in effect after satisfaction made.

Cases,

Cases, however, may, and do frequently arise, where the salvage is so high, the other expences are so great, and the object of the voyage is so far defeated, that the insured is allowed by the laws of all trading nations, to abandon his interest in the property saved to the insurer, and to call upon him to contribute as if a total loss had actually happened. What circumstances shall be deemed sufficient to justify the assured in making such an abandonment, will be the subject of the following chapter.

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CHAPTER THE NINTH.

Of Abandonment.

CHAP.
IX.Chap. 4.
p. 109.
Pothier's
Traité du
Contrat
d'Assurance,
131.
Vide c. 6.
p. 132.See Randall
v. Cockran,
1 Vef. 98.
note, c. 8.
p. 190.France,
Rotterdam,
Bilboa, Mid-
dleburgh.Pothier,
c. 128. Ord.
of Law. 14.
art. 47.
Ord. of Bil-
boa, 32.

WE have formerly seen, that the insured, before he can demand a recompense from the underwriter for a total loss, must cede or abandon to him his right to all the property that may chance to be recovered from shipwreck, capture, or any other peril, stated in the policy. It has also been observed, and from the preceding sentence it is obvious, that when we speak of a total loss, with respect to insurances, we do not always mean, that the thing insured is absolutely lost and destroyed : but that, by some of the usual perils, it is become of so little value, as to entitle the insured to call upon the underwriter to accept of what is saved, and to pay the full amount of his insurance, as if a total loss had actually happened. Indeed, the word abandonment conveys the idea, that the whole property is not lost ; for it is impossible to cede or abandon that which does not exist. When the underwriter has discharged his insurance, and the abandonment is made, he stands in the place of the insured, and is entitled to all the advantages resulting from that situation.

From what has been said then, it appears that abandonment dates its origin from the period at which the contract of insurance was itself introduced ; because insurance being a contract of indemnity, the insured can recover no more than the amount of the loss actually sustained : but if he were allowed to recover for a total loss, and might also retain the property saved, he would be a considerable gainer, which the law will not allow.

Accordingly we find, that the doctrine of abandonment has obtained a place in the laws of all the maritime nations in the world, where insurance has been known : and in all those laws the definition of it is the same, namely, that when any goods or ships that are insured, happen to be lost, taken, or spoiled, the insured is obliged to abandon such goods or ships for the benefit of the insurers, before he can demand any satisfaction from them.

In this respect also, they seem to be agreed, that when an abandonment is made, it must be a total, not a partial one ; that is, one part of the property insured shall not be retained, and the other part abandoned ; a regulation certainly founded in justice.

The

The propriety and justice of abandoning in certain cases to the insurers being apparent, it will be proper to consider in what cases, and under what circumstances, the insured is entitled to exercise this power: for though in all cases the insured has a right to say, he will not abandon; yet he cannot at his pleasure harass the insurer, by saying he will abandon, and thereby turn that, which, in its own nature, was only a partial, into a total loss.

2 Barr. 697.

In questions of this nature, the opinion of learned foreigners must always have weight: because they are not questions of positive regulation, or municipal law: but of general and extensive import: not confined to any particular state, but founded on the great principles of reason, justice, and universal law. The learned *Roccus*, who has accurately examined the works of those writers that went before him, and who, after stating their various opinions, forms his own conclusions, has not been silent upon this occasion. He puts this question; “*Affecuratore, qui jam solvit æstimationem mercium deperditarum, si postea dictæ merces appareant et recuperatæ sint, an possit cogere dominum ad accipiendas illas, et ad reddendam sibi æstimationem, quam debet.*” He answers, “*Distingue; aut merces, vel aliqua pars ipsarum appareant, et restitui possint, antequam solutionem æstimationis, et tunc tenetur dominus mercium illas recipere, et pro illâ parte mercium apparentium, liberabitur affecuratore, nam qui tenetur ad certam quantitatem respectu certæ speciei, dando illam, liberatur, et etiam, quia contractus affecurationis est conditionalis, scilicet si merces deperdantur: non autem dicuntur deperditæ, si postea repariantur. Verum si merces non appareant in illa pristina bonitate, aliter sit æstimatio, non in totum, sed prout tunc valent. Aut vero post solutam æstimationem ab affecuratore comparent merces, et tunc est in electione mercium affecurati vel recipere merces, vel retinere pretium.*”

Roccus,
No. 50.

And although a subsequent passage in the same author may seem to contradict that just recited; yet when attended to, they are both perfectly consistent. He says, “*sufficit semel extitisse conditionem ad beneficium affecurati de amissione navis, etiam quod postea sequeretur recuperatio; nam per talem recuperationem non poterit præjudicari affecurato.*”

Roccus,
No. 66.

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From this passage it may be inferred, that a total loss having once happened, it must always continue so. But it must be understood, with reference to the context, and other parts of the work, from which it appears, that in order to entitle the insured to recover as for a total loss, it must continue total, at the time when the offer of abandonment is made, at the time of the action brought, or at the time of the payment of the money.

Chap. 7. f. 1.

In a *French* treatise, called *Le Guidon*, it is said, that the insured may abandon to the underwriter, and call upon him for a total loss, if the damage exceed half the value of the thing; or if the voyage be lost, or so interrupted, that the pursuit of it is not worth the freight.

Ord. Lew.
14 Ord. of
Bib. Ord.
of Rot.
a Magens.

The same idea, with respect to the circumstances which will justify an abandonment, seems to prevail in almost all the foreign ordinances.

But in no country have the principles of abandonment been more accurately defined than in *England*: and it must be remembered, that the decisions, from which the following principles are selected, are of the greatest authority; that they are not merely the opinions of private speculative men, but the solemn and deliberate judgment of the grave and learned judges of the *English* courts; judgments formed after mature deliberation and serious argument; established upon the solid and permanent *basis* of reason and good sense.

a Burr.
1209.

Guidon,
ch. 7. f. 1.

From those decisions we may collect, that the right to abandon must arise upon the object of the insured being so far defeated that it is not worth his while to pursue it: such a loss as is equally inconvenient to him, as if it had been total. For instance, if the voyage be absolutely lost, or not worth pursuing; if the salvage be very high, *suppose a half*; if further expence be necessary; if the insurer will not engage at all events to bear that expence, though it should exceed the value, or fail of success: under these, and many other like circumstances, the insured may disentangle himself, and abandon, notwithstanding there has been a recapture.

It is evident, that there may be circumstances in which it would be contrary to every principle of justice to suffer the insured to abandon; for a ship might be taken, and escape immediately, which would be no hindrance at all to the voyage: or she might be taken and instantly ransomed, which would amount only to a partial loss; in which case the insured shall not be allowed to demand a recompence for a total loss.

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2 Burr. 697.
1113.

It is also material to observe, that the right to abandon must depend upon the nature of the case at the time of the action brought, or at the time of the offer to abandon: a determination founded, as I have said before, on the nature of the contract between the parties; because an insurer ought never to pay less, upon a contract of indemnity, than the value of the loss; and the insured ought never to gain more.

Burr. 1214.

From what has been said, it will appear sufficiently evident, that the owner cannot abandon, unless at some period or other of the voyage there has been a total loss: and therefore, if neither the thing insured, nor the voyage be lost, and the damage sustained shall be found, upon computation, not to amount to a moiety of the value, the owner shall not be allowed to abandon.

1 Term Rep.
P. 191.

These principles are fully illustrated and confirmed by the judgments given in the following cases.

The defendant had insured the ship *Success* from London to Bermudas, and so to Carolina; the ship was taken by a Spanish privateer, and afterwards retaken by an English privateer, and carried into Boston in New England, where, no person appearing to give security, or to answer the moiety the recaptors were entitled to for salvage, she was condemned and sold in the court of Admiralty there: the recaptors had their moiety, and the overplus money remained in the hands of the officers of that court. An action upon the policy was brought at law by the defendant here, who obtained a verdict against the now plaintiff.

Pringle v.
Hartley, in
Chancery,
1744.
3 Atk. 195.

The plaintiff brought a bill, suggesting the capture to be fraudulent, and done designedly by the captain; and now moved for an injunction to stay the proceedings at law.

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It was contended for the plaintiff, that though the capture might not be fraudulent, yet the defendant ought not to recover more on the policy than a moiety of the loss, as the act of the 13 Geo. 2. c. 4. §. 18. gives the thing saved to the owner, and he is entitled to receive it from the officers of the Admiralty: and that the plaintiff ought to be obliged to pay no more than the loss actually sustained, which cannot be ascertained till after the defendant shall have received the part that might have come to him upon the salvage.

The defendant in his answer had sworn, that he had offered, and was now willing to relinquish his interest to the plaintiffs in the benefit of the salvage, and would give them a letter of attorney for that purpose to receive it.

Lord Chancellor *Hardwicke*.—"There is no ground for an injunction in this case; here there was an agreement to go to trial in one of these actions which had been brought, and to be bound by the event of that: at the time of the trial, they knew that the ship was retaken, and the manner of the capture. The *quantum* of the damage and loss sustained is the only thing now to be disputed; for it is impossible to carry on trade without insuring, especially in time of war. Therefore regard must be had to the insured, as well as to the insurer; and where there is no admission in the answer of any kind of fraud, though various pretences of that sort may be set up by the bill, they are not to be regarded. The question then arises on the statute of 13 Geo. 2. with regard to the salvage. It has been said, there ought to be only half the loss recovered on the policy; and as to that, the act has made great alteration in the law of nations with respect to recaptures. The carrying a ship *infra presidia hostium*, or *si pernoctaverit* with the enemy, makes it the prize of the person retaking it, as if it had been originally the ship of the enemy: but by the act the recaption is the revesting of the property of the owner. If there is a salvage, that must be deducted out of the money recovered by the policy; but if none has come to the hands of the plaintiff in the action, the jury cannot take notice of it. The ship was condemned and sold, because the money was not paid, or secured to be paid by the owners. It is uncertain whether the defendant will receive any thing or not: and if any thing be recovered, he must have an allow-

ance for his expences in recovering. Therefore I take it, when he is willing to relinquish his interest in the salvage, he ought to recover the whole money insured. It would be mischievous if it were otherwise, for then upon a recapture a man would be in a worse situation than if the ship were totally lost." Injunction was denied.

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But the first case to be found in our books, in which the doctrine of abandonment was fully gone into, in which its principles were settled, and applied to the particular circumstances then before the court, was the case of *Goss* and another against *Withers*.

It was a special case from the sittings in *London*, upon two actions, on two distinct policies of insurance; one upon a ship, and the other upon the loading.

Goss and another v. Withers,
2 Burr. 683.

The former was an insurance on the *David* and *Rebecca*, at and from *Newfoundland* to her port of discharge in *Portugal* or *Spain*, without the *Streights*, or *England*, to commence from the time of her beginning to load at *Newfoundland*, for either of the above named places; and to continue till she should be arrived at her said port of discharge, and there moored 24 hours at anchor in safety. The ship was, by agreement, to be valued at the sum subscribed; without further account. The insurance was to be at ten guineas *per cent.*: and in case of loss to abate two *per cent.*: and in case of average loss not exceeding 5*l.* *per cent.* to allow nothing towards such loss. And if the vessel was discharged without the *Streights*, excepting the *Bay of Biscay*, two guineas *per cent.* were to be returned: and if she sailed with convoy and arrived, two guineas more *per cent.* were to be returned. The plaintiffs declared upon a total loss, by capture by the *French*.

The policy, declared upon in the other action, was an insurance upon any kind of lawful goods and merchandizes, loaden or to be loaden on board the aforesaid ship; and this policy for 7*l.* 7*s.* insured 70*l.* The declaration alleged, that divers quantities of fish and other lawful merchandizes, to the value of the money insured, were put on board, to be carried from *Newfoundland* to her port of destination, and so continued (except such as were thrown overboard as is after mentioned)

C H A P. till the loss of the ship and goods. The declaration then avers,
 IX. that a part of the said goods were necessarily thrown overboard
 in a storm, to preserve the ship and the rest of the cargo; after
 which jetson, the ship and the remainder of the goods were
 taken by the *French*.

The case states, that the ship departed from her proper port, and was taken by the *French* on the 23d of *December* 1756: and that the master, mates, and all the sailors, except an apprentice and landman, were taken out and carried to *France*. That the ship remained in the hands of the enemy *eight days*, and was then retaken by a *British* privateer, and brought in on the 18th of *January* to *Milford-Haven*, and that immediate notice was given by the insured to the insurer, with an offer to abandon the ship to their care. It was also proved at the trial, that before the taking by the enemy, a violent storm arose at sea, which first separated the ship from her convoy, and afterwards disabled her so far as to render her incapable of proceeding on her destined voyage without going into port to refit. It was also proved, that part of the cargo was thrown overboard in the storm: and the rest of it was spoiled while the ship lay at *Milford-Haven*, after the offer to abandon, and before she could be refitted: and the insured proved their interest in the ship and cargo, to the value insured.

Several questions arising upon the trial of the first of these causes it was agreed, that the jury should bring in their verdicts in both causes, for the plaintiffs, as for a total loss; subject, however, to the opinion of the court on the following questions, viz.

1st, Whether this capture of the ship by the enemy, was or was not such a loss, as that the insurers became liable thereby?

2dly, Whether, under the several circumstances of this case, the insured had or had not a right to abandon the ship to the insurers, after she was carried into *Milford-Haven*?

After two arguments, the Court decided unanimously in favour of the plaintiffs; and in the opinion then delivered by Lord Mansfield, all the law upon this subject was fully discussed. It

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will not be necessary, however, to state in this place what fell from his lordship upon the first of these questions, thus submitted to the opinion of the Court; because that was very copiously treated of in a former chapter, in which it was shewn, that whether property was or was not transferred to the enemy by a capture, and absolutely lost to the original owner, it could no way affect the contract entered into between an insurer and insured. It will be sufficient then to follow his lordship in the second part of his argument.

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Vide ante
c. 4. p. 82.
92.

Lord *Mansfield*—‘The single question, therefore, upon which this case turns, is, whether the insured had, under all the circumstances, an election to abandon, on the 18th of *January* 1757? The loss and disability were in their nature total, at the time they happened. During eight days, the plaintiff was certainly entitled to be paid by the insurer, as for a total loss; and in case of a recapture, the insurer would have stood in his place. The subsequent recapture is, at best, a saving only of a small part: *half the value must be paid for salvage*. The disability to pursue the voyage still continued. The master and mariners were prisoners. The charter-party was dissolved. The freight (except in proportion to the goods saved) was lost. The ship was necessarily brought into an *English* port. What could be saved, might not be worth the expence necessarily attending it; which is proved by the plaintiff's offer to abandon. The subsequent title to restitution, arising from the recapture, at a great expence, the ship too being disabled from pursuing her voyage, cannot take away a right vested in the insured at the time of the capture. But because he cannot recover more than he has suffered, he must abandon what may be saved. I cannot find a single book, ancient or modern, which does not say, that in case of a ship being taken, the insured may demand as for a total loss, and abandon. What proves the proposition most strongly is, that by the general law, he may abandon in the case merely of an arrest, or an embargo, by a prince not an enemy. Positive regulations in different countries have fixed a precise time before the insured should be at liberty to abandon in that case. The fixing a precise time proves the general principle. Every argument holds stronger in the case of the other policy with regard to the goods. The cargo was in its nature perishable, destined from *Newfoundland* to *Spain* or *Portugal*; and the voyage was as absolutely de-

Vide the stat.
13 Geo. II.
c. 4. s. 78.
now altered
by 33 Geo.
III. c. 66.
s. 42.

Vide ante.
c. 4. p. 109.

C H A P. IX. { feated, as if the ship had been wrecked, and a third or fourth of the goods saved.

“No capture by the enemy can be so total a loss, as to leave no possibility of a recovery. If the owner himself should retake at any time, he will be entitled; and by the late act of parliament, if an *English* ship retake at any time, before condemnation or after, the owner is entitled to restitution upon stated salvage. This chance does not suspend the demand, for a total loss, upon the insurer: but justice is done, by putting him in the place of the insured, in case of a recapture. In questions upon policies, the nature of the contract, as an indemnity, and nothing else, is always liberally considered. There might be circumstances, under which a capture would be but a small temporary hindrance to the voyage; perhaps none at all: as if a ship were taken, and, in a day or two, escaped entire, and pursued her voyage. There are circumstances, under which it would be deemed an average loss: if a ship taken be immediately ransomed, and pursue her voyage, there the money paid is an average loss. And in all cases, the insured may chuse not to abandon. In the second part of the “*Usages and Customs of the Sea*,” (a *French* book translated into *English*) a treatise is inserted called *Le Guidon*, in which, after mentioning the right to abandon upon a capture, he adds, “or any other such disturbance as defeats the voyage; or makes it not worth while, or worth the freight to pursue it;” I know that in late times the privilege of abandoning has been restrained, for fear of letting in frauds; and the merchant cannot elect to turn that, which, at the time it happened, was in its nature but a partial, into a total loss, by abandoning. But there is no danger of fraud in the present case. The loss was total at the time it happened: it continued total, as to the destruction of the voyage. A recovery of any thing could only be had, by paying more than half the value, including the costs. What could be saved of the goods, might not be worth the freight for so much of the voyage as they had gone, when they were taken. The cargo, from its nature, must have been sold, where it was brought in. The loss, as to the ship, could not be estimated; nor the salvage of half be fixed, by a better measure than a sale. In such a case, there is no colour to say, that the insured might not disentangle himself from unprofitable trouble and further expence, and leave the insurer to save what he could. It might as reason-

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Vide ante,
p. 194.

ably be argued, that if a ship sunk were weighed up again at great expence, the crew having perished, the insured could not abandon, nor the insurer be liable, because the body of the ship was saved. We are therefore of opinion, that the loss was total by the capture, and the right which the owner had, after the voyage was defeated, to obtain restitution of the ship and cargo, paying great salvage to the recaptor, might be abandoned to the insurers, after she was brought into *Milford-Haven*."

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The principles laid down in this case have been strictly adhered to in all similar cases; and particularly in one, which it will be proper to mention in this place, before we come to the great cause of *Hamilton v. Mendes*, in which some other principles relative to this subject were established.

It was an action on a policy of insurance, on the ship the *Hope* and her freight, from *Montserrat* to *London*. The plaintiff went for a total loss: the defendant insisted, that he was only entitled to recover for an average loss. The jury found a verdict for a total loss; and upon a motion for a new trial, the facts of the case appeared to be as follows: the ship, when proceeding on her voyage, was captured on the 23d of *May*, by two *American* privateers, who took the captain and all the crew, and part of the cargo, which consisted of sugars, out of her. The rigging was also taken away. She was afterwards retaken, and carried into *New-York*, where the captain arrived on the 23d of *June*, and, taking possession of her, found that part of what had been left of the cargo was washed overboard, that fifty-seven hogsheds of what remained were damaged, and that the ship was leaky, and in such a state, that she could not be repaired without unloading her entirely. The owners had no storehouses at *New-York*, in which the sugars could have been put, while the ship was repairing, nor any agent there to advise or direct the captain. No sailors were to be had. The only method he had of paying the salvage, which amounted to the value of forty hogsheds of sugar, was by sale of part of the cargo, or the ship. The captain did not know of the insurance. If he had repaired the ship, his expences would have exceeded the freight more than 100*l*. There was an embargo on all vessels at *New-York* till the 27th of *December*; and by the destination of his ship, she was to have arrived at *London* in *July*. Under these circumstances, he consulted with his friends at *New York*, and resolved upon

Miles v.
Fletcher,
Dougl. 219.

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upon their opinion and his own, to sell the ship and cargo, as the most prudent step for the interest of his employers. The cargo was accordingly sold and paid for. The ship was also contracted for, but the person who had agreed to buy her, ran away, and the captain left her in a creek near *New-York*, and returned to *England*, where he arrived in the *February* following, and gave the plaintiff notice of what had been done, which was the first information he received of it, and the plaintiff immediately claimed as for a total loss from the underwriters, and offered to abandon. Lord *Mansfield* told the jury, that if they were satisfied the captain had done what was best for the benefit of all concerned, they must find as for a total loss, which they accordingly did.

Upon the motion for a new trial, the unanimous opinion of the Court was delivered by

Lord *Mansfield*.—"The great object in every branch of the law, but especially in mercantile law, is certainty, and that the grounds of decision should be precisely known. I took great pains in delivering the opinion of the Court in the cases of *Goss v. Withers*, and *Hamilton v. Mendes*. I read both those cases over last night, and I think that from them, the whole law between insurers and insured, as to the consequences of capture and recapture, may be collected. Wherever a question of law arises at *nisi prius*, I propose a case, or grant one, when asked for by the counsel, and I avoid as much as possible blending fact and law together, having seen the inconvenience of it in *Pole v. Fitzgerald*. But on the trial of this cause, it did not appear to me, that there was any question of law, and no case was asked for. It was impossible to ask for one, till the facts were ascertained; and when they were, it would have been impossible to state them in any way, which could have left a doubt on the law. It was not contended, that a capture necessarily amounts to a total loss between insurer and insured; nor, on the other hand, that on a capture and recapture, there may not be a total loss, though there remain some material tangible part of the ship and cargo. Neither was it contended, that the captain has an arbitrary power, by his act, to make the loss, either partial or total, as he pleases. A great deal has been said about what the admiralty could, or would have done, in such a case, in order to pay the

Vide post.

the salvage. As to that, if no owner appeared, they would condemn the whole; but if they saw, from the ship's papers, that there was one, they would not. If there were different claimants of the ship and cargo, they would leave it to them to say, what part should be sold, and if they differed in opinion, would order the sale of such part as would be attended with the smallest loss. But all *that* is foreign to the present question, which is singly this, whether the consequences of the capture were such as, notwithstanding the recapture, occasioned a total obstruction of the voyage, or only a partial one, as in the case of *Hamilton v. Mendes*. In that case, and in *Goss v. Withers*, great stress was laid on the situation of the ship and cargo, at the time when the insured had notice, at the time of the offer to abandon, and at the time when the action was brought. No cases say, that the bare existence of the hull of the ship prevents the loss being total. The rule is laid down, "that if the voyage be lost, or not worth pursuing, if the salvage be high, if farther expence be necessary, if the insurer will not at all events undertake to pay that expence, &c. the insured may abandon, notwithstanding a recapture." Here, at the time of the capture, there were no hopes of a recovery; no friend's ship in sight; no means of resistance; all the crew were taken out, and part of the cargo; and the rigging also taken away. Afterwards the ship was retaken, and carried into *New-York*. When she was brought there, it still continued a total loss. Neither the insurers, nor the insured, had any agent in the place. The court of Admiralty must have proceeded *secundum equum et bonum*, and might have sold her for the benefit of those concerned. When the insured first had notice, and offered to abandon, (which was when the captain came to *England*,) and when the action was brought, it was still a total loss. The voyage was abandoned, the cargo sold, and the ship left to be sold. The only answer the defendant makes, or can make to this is, that the loss was total indeed; but that the captain made it so, by his improper conduct; for that on his taking possession of the ship, the loss became partial, and that he ought to have pursued the voyage. But is this defence true in fact? The captain, when he came to *New-York*, had no express order; but he had an implied authority, from both sides, to do what was fit and right to be done, as none of them had agents in the place: and whatever it was right for him to have done, if it had been his own ship and cargo, the under-

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underwriter must answer for the consequences of, because this is within his contract of indemnity. Suppose there had been no insurance, what ought the captain to have done? 1st, As to the cargo, according to the course of the voyage, the ship should have arrived at *London* in *July*. On the capture, part had been taken out, some was washed overboard, 57 hogshheads were damaged, and the whole, from the leaking of the vessel, was in a perishable state. There were no storehouses; nor could the ship proceed in the state she was in. The crew were gone, and an embargo was laid on till *December*. What, shall a cargo, which was intended to arrive at *London* in *July*, be kept in a perishable state at *New-York*, in a leaky vessel, till *December*? 2d y, As to the ship, it was certainly better to sell her, than to bring her, to *London*. There was no crew belonging to her; and she had no cargo. Even if all the cargo had been left, the expences of repairs would have exceeded the freight. If she had been brought home, the expence of bringing her might have been more than what she would have sold for in *London*. It has been said, that the damage would not have fallen on the underwriters; but the argument drawn from thence is a fallacy; for that circumstance goes to determine it to be the interest of the insured to abandon the voyage. The point is, what did the owner suffer by the capture; and it appears that he suffered so much, that it was not worth while to pursue the voyage. The whole voyage was lost. As the captain did not know of the insurance, he had no temptation to give the turn of the scale to one side or the other. I left it to the jury to determine, whether what the captain had done was for the benefit of the concerned. If they had found "that it was" in words, where would have been the question of law?"

The Court therefore discharged the rule for a new trial.

It was necessary to be very particular in stating this case from the work of such an accurate reporter as Mr. *Douglas*, for two reasons: 1st, Because it is a determination, exactly conformable to that of *Goss v. Withers*, recognizing and confirming the principles there laid down; and 2dly, To relieve the Court from the observations made, on account of the above decision. A case has appeared in print, under the name of *Milles v. Hayley*, upon the same policy, the same ship, and the same voyage: but the author

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of the work, in which it appears, could not possibly have been present at the trial; and the facts must have been mistated to him: or if present, he has not taken down the evidence with sufficient accuracy. For he has not stated, that on the capture, part of the cargo, and also the rigging, were taken away: that part of what had been left of the cargo was washed overboard: that 57 hogsheds of the sugar that remained, were damaged: that the ship was leaky, and in such a state, that she could not be repaired without unloading her entirely: that the salvage amounted to the value of 40 hogsheds of sugar: that the repairs would have exceeded the freight by more than 100*l.*: and that the embargo was to continue till the 27th of *December*: whereas the ship ought to have arrived at *London* in the *July* preceding: all which circumstances are to be found in Mr. *Douglas's* report: all of them are material to the decision of the cause, and upon all of them much stress is laid by Lord *Mansfield*, in delivering the judgment of the Court. It was thought proper to note these differences; as nothing is so necessary in all cases, more especially in those of insurance, as the accurate and precise statement of circumstances.

But although the doctrine advanced in *Goss v. Wisbers*, was so very general and comprehensive: yet it certainly is not to be considered, as precluding the possibility of an exception to the generality of the principle there established.

Indeed, from the whole tenor of the Chief Justice's very learned argument upon that occasion, it is apparent, that he had at that very time an exception in his view: and from some of the words he then used, it would almost induce one to suppose, that his lordship had foreseen the very case, which actually came to be decided within a few years afterwards.

It was a special case reserved at *Guildhall*, at the sittings there before Lord *Mansfield*, after *Michaelmas* term 1760, in an action brought against the defendant, as one of the insurers, upon a policy of insurance from *Virginia* or *Maryland* to *London*, of a ship called the *Selby*, and of goods and merchandize therein, until she shall have moored at anchor 24 hours in good safety. The case stated for the opinion of the Court was as follows:

Hamilton v.
Mendes,
2 Burr.
1103. and
1 Blac. 276.

That the ship *Selby*, mentioned in the policy, being valued at 1,200*l.*; and the plaintiff having interest therein, caused the policy

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licy in question to be made ; and the same was accordingly made, in the name of *John Mackintosh*, on behalf and for the use and benefit of the plaintiff, and was subscribed by the defendant, as stated, for 100*l*. That the ship was in good safety at *Virginia*, where she took on board 192 hogheads of tobacco, to be delivered at *London*. That on the 28th day of *March*, she departed, and set sail from *Virginia* to *London* ; and on the 6th day of *May* following, as she was sailing and proceeding in her said voyage, was taken by a *French* privateer called the *Aurora* of *Bayonne*. That at the time of the capture, the *Selby* had nine men on board ; and the captain of the said privateer took out six, besides the captain, leaving only the mate and one man on board. That the *French* put a prize-master and several men on board the ship *Selby*, to carry her to *France*. That as the *French* were carrying her towards *France*, on the 23d day of the said *May*, she was retaken off *Bayonne*, by an *English* man of war ; and accordingly sent into *Plymouth*, where she arrived the 6th day of *June* following. That the plaintiff, living at *Hull*, as soon as he was informed what had befallen his ship, the *Selby*, wrote a letter on the 23d of *June* to his agent *John Mackintosh*, living in *London*, to acquaint the defendant, “ that the plaintiff did from thence “ abandon to him his interest in the said ship, as to the said “ 100*l*. by the defendant insured.” That the said *J. M.* on the 26th of *June*, acquainted the defendant with the offer to abandon the ship ; to which the defendant answered, “ that he did “ not think himself bound to take to the ship ; but was ready to “ pay the salvage, and all other losses and charges that the plaintiff sustained by the capture.” That upon the 19th day of *August*, the ship *Selby* was brought into the port of *London*, by the order of the owners of the cargo, and the recaptors : that the ship *Selby* sustained no damage from the capture. That the whole cargo of the said ship was delivered to the freighters, at the port of *London*, who paid the freight to *Benjamin Vaughan*, without prejudice. The question, therefore, submitted to the opinion of the Court is, Whether the plaintiff, on the said 26th day of *June*, had a right to abandon, and has a right to recover, as for a total loss ?

After two arguments at the bar upon this question, and after the Court had taken time to deliberate upon it, their unanimous resolution was delivered by the Chief Justice,

Lord Mansfield. —“ The plaintiff has averred in his declaration, as the basis of his demand for a total loss, “ that by the capture, “ the ship became wholly lost to him.” The general question is, Whether the plaintiff, who, at the time of his action brought at the time of his offer to abandon, and at the time of his being first apprized of any accident having happened, had only, in truth, sustained a partial loss, ought to recover for a total one? In support of the affirmative, the counsel for the plaintiff insisted on the four following points: 1st, That by this capture, the property was changed; and therefore, the loss total for ever. 2dly, If the property were not changed, yet the capture was a total loss. 3dly, That when the ship was brought into *Plymouth*, particularly on the 26th day of *June*, the recovery was not such as, in truth, changed the totality of the loss into an average. 4thly, Supposing it did, yet, the loss having once been total, a right vested in the insured to recover the whole upon abandoning; of which right he could never be divested by any subsequent event.

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“ As to the first point. If the change of property were at all material between the insurer and insured, it would not be applicable to this case; because by the marine law of *England*, there is no change of property, in case of a capture, before condemnation; and now by the act of parliament, the *jus postliminii* continues for ever. I know many writers argue, between the insurer and the insured, from the distinction, whether the property was or was not changed by the capture, so as to transfer a complete right from the enemy to a recaptor, or neutral vendee, against the former owner. But arbitrary notions concerning the change of property by capture, as between the former owner and recaptor, or a vendee, ought never to be the rule of decision, as between the insurer and insured upon a contract of indemnity, contrary to the real truth of the fact. And therefore I agree with the counsel for the plaintiff, upon this second point, that by this capture, while it continued, the ship was totally lost, though it be admitted, that the property, in the case of a recapture, never was changed, but returned to the former owner.

29 Geo. II.
c. 34. s. 24.

“ The third point depends, as every question of this kind must, upon the particular circumstances. It does not necessarily follow that, because there is a recapture, therefore the loss ceases to be total. If the voyage be so defeated, as not to be worth the further

C H A P. IX. ther pursuit ; if the salvage be high, and the other expences great ; or if the underwriter refuse to bear these expences, the insured may abandon. But in the present case, the voyage was so far from being lost, that it had only met with a short temporary obstruction ; the ship and cargo were both entirely safe ; the expence incurred did not amount to near half the value ; and upon the 26th of *June*, when the ship was at *Plymouth*, and the offer was made to abandon, the insurer undertook to pay all charges and expences, to which the plaintiff might be put by the capture. The only argument to shew that the loss had not then ceased to be total, was built upon a mistaken supposition, that the recaptor had a right to demand a sale, and to put a stop to any further prosecution of the voyage. But that is not so. The property returned to the plaintiff, pledged to the recaptors for one-eighth of the value, as salvage for retaking and bringing the ship into an *English* port. Upon paying this, the owner was entitled to restitution. The recaptor had no right to sell the ship. If they differed about the value, the Court of Admiralty would have ordered a commission of appraisement. In this case, it was the interest of the owner of the ship, the owners of the cargo, and the recaptors, that she should forthwith proceed upon her voyage from *Plymouth* to *London*. But had the recaptor opposed it, or affected delay, the Court of Admiralty would have made an order for bringing her immediately to *London*, her port of delivery, upon reasonable terms. Therefore, it is most clear, that upon the 26th day of *June*, the ship had sustained no other loss, by reason of the capture, than a short temporary obstruction, and a charge which the defendant had offered to pay and satisfy. This brings the whole to the fourth and last point.

“ The plaintiff’s demand is for an indemnity. This action then must be founded upon the nature of his damnification, as it really is, at the time the action is brought. It is repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event has decided, that the damnification, in truth, is an average, or perhaps no loss at all. Whatever undoes the damnification, in whole or in part, must operate upon the indemnity, in the same degree. It is a contradiction in terms, to bring an action for indemnity, when, upon the whole event, no damage has been sustained. The reason is so much founded in sense, and the nature of the thing, that the common law of *England*

England adopts it, though inclined to strictness. The tenant is obliged to indemnify his lord from waste; but if the tenant do, or suffer waste to be done in houses, yet if he repair before any action brought, there lies no action of waste against him. He cannot however plead "*non fecit vastum*," but the special matter. The special matter shews, that the injury being repaired before the action brought, the plaintiff had no cause of action: and whatever takes away the cause, takes away the action. Suppose a surety sued to judgment; and afterwards, before an action is brought, the principal pays the debt and costs, and procures satisfaction to be acknowledged upon record: the surety can have no action for an indemnity, because he is indemnified before any action is brought. If the demand or cause of action does not subsist, at the time the action is brought, the having existed at any former time can be of no avail. But in the present case, the notion of the vested right in the plaintiff to sue as for a total loss, before the recapture, is fictitious only, and not founded in truth. For the insured is not obliged to abandon, in any case; he has an election. No right can vest as for a total loss, till he has made that election: he cannot elect, before advice is received of the loss; and if that advice shew the peril to be over, and the thing in safety, he cannot elect at all, because he has no right to abandon when the thing is safe. Writers upon maritime law are apt to embarrass general principles with the positive regulations of their own country: but they all seem to agree, that if the thing be recovered before the money is paid, the insured can only be entitled according to the final event." His lordship here cited the passage from *Roccus*, which we have already seen at the beginning of this chapter, and then proceeded thus:

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Co. Litt.
53. a.

Roccus,
Not. 50.

"In the case of *Spencer v. Franco*, though upon a wager policy, the loss was held not to be total, after the return of the ship *Prince Frederick* in safety; though she had been seized and long kept by the king of *Spain*, in a time of actual war. In the case of *Pole v. Fitzgerald*, though upon a wager policy, the majority of the judges and the house of lords held there was no total loss, the ship having been restored before the expiration of the four months, the time for which she was insured.

Vide ante,
c. 4. p. 99.

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"The present attempt is the first that ever was made, to charge the insurer as for a total loss, upon an interest policy, after the thing was recovered; and it is said, the judgment in the case of *Goss v. Withers* gave rise to it. It is admitted, that that case was no way similar. Before that action was brought, the whole ship and cargo were literally lost; at the time of the offer to abandon, a fourth of the cargo had been thrown overboard; the voyage was entirely lost; the remainder of the cargo was fish perishing, and of no value at *Milford Haven*, where the ship was brought in; the ship so shattered, as to want great and expensive repairs, the salvage was one half, and the insurer did not engage to be at any expence: it did not appear that it was worth while to try to save any thing: and the recaptor, though entitled to one half, as well as the owner of the ship and cargo, left the whole to perish, rather than be at any further trouble or expence. But it is said, though the case was entirely different, some part of the reasoning warranted the proposition now inferred by the plaintiff from it. The great principle relied upon was, "that as between the insurer and insured, the contract being "an indemnity, the truth of the fact ought to be regarded; and "therefore there might be a total loss by a capture, which could "not operate as a change of property; and a recapture should "not relate by fiction (like the *Roman jus postliminii*) as if the "capture had never happened, unless the loss was in truth recovered." This reasoning proved *à converso*, that if the thing in truth were safe, no artificial reasoning shall be allowed to set up a total loss. The words quoted at the bar were certainly used, "that there is no book, ancient or modern, which does "not say, that in case of the ship being taken, the insured may "demand for a total loss, and abandon." But the proposition was applied to the subject matter, and is certainly true, provided the capture, or the total loss occasioned thereby, continue to the time of abandoning, and bringing the action. The case then before the court did not make it necessary to specify all the restrictions. But I will read to you *verbatim*, from my notes of the judgment then delivered, what was said, to prevent any inference being drawn beyond the case then determined."

Vide ante,
Goss v.
Withers.

His lordship, having read a great part of his former argument in that case, went on in this way:

"From

"From this mode of reasoning, it did by no means follow, that if the ship and cargo had, by the recapture, been brought safe to the port of delivery, without having sustained any damage at all, that the insured might abandon. But without dwelling longer upon principles or authorities, the consequences of the present question are decisive. It is impossible that any man should desire to abandon in a case circumstanced like the present, but for one of two reasons, namely, either because he has over-valued, or because the market has fallen below the original price. The only reasons, that can make it the interest of the party to desire, are conclusive against allowing it. It is unjust to turn the fall of the market upon the insurer, who has no concern in it and could never gain by the rise. And an over-valuation is contrary to the general policy of the marine law; contrary to the spirit of the act of 19 Geo. 2. a temptation to fraud, and a great abuse: therefore no man should be allowed to avail himself of having over-valued. If the valuation be true, the plaintiff is indemnified, by being paid the charge he was put to by the capture. If he has over-valued, he will be a gainer, if he be permitted to abandon: and he can only desire it, because he has over-valued. This was avowed upon the first argument: and that very reason is conclusive against its being allowed. The insurer, by the marine law, ought never to pay less, upon a contract of indemnity, than the value of the loss: and the insured ought never to gain more. Therefore, if there were occasion to resort to that argument, the consequence of the determination would alone be sufficient upon the present occasion. But upon principles, this action could not be maintained as for a total loss, if the question were to be judged by the strictest rules of common law: much less can it be supported for a total loss, as the question ought to be decided, by the large principles of the marine law, according to the substantial intent of the contract, and the real truth of the case. If the question is to depend upon the fact, every man can judge of the nature of the loss, before the money is paid. But if it is to depend upon speculative refinements, from the law of nations, or the *Roman jus postliminii* concerning the change or reverting of property, no wonder that merchants are in the dark, when doctors have differed upon the subject, from the beginning, and are not yet agreed. To obviate too large an inference being drawn from this determina-

C H A P. IX. tion, I desire it may be understood, that the point here determined is, "that the plaintiff, upon a policy, can only recover "an indemnity, according to the nature of his case at the time "of the action brought, or (at most) at the time of his offer "to abandon." We give no opinion how it would be, in case the ship or goods were restored in safety, between the offer to abandon, and the action brought; or between the commencement of the action, and the verdict. And particularly I desire, that no inference may be drawn, "that in case the ship or goods should "be restored after the money paid as for a total loss, the insurer "could compel the insured to refund the money, and to take "the ship or goods;" that case is totally different from the present, and depends, throughout, upon different reasons and principles. Here the event had fixed the loss to be an average only, before the action brought; before the offer to abandon; and before the plaintiff had notice of any accident: consequently before he could make an election. We are therefore of opinion, that he cannot recover for a total, but for a partial loss only; the quantity of which has been estimated by the jury at ten pounds *per cent.*"

But although the court did not chuse unnecessarily to decide, whether, after payment as for a total loss, the underwriter could oblige the insured to refund, if it should afterwards prove to be but partial: yet in the year 1766 this very same question came before them. It arose in the case of *Da Costa v. Firth*, which was cited at large in a preceding chapter; and the court held, that as there was a solemn abandonment, and the money was paid, and as there was also an agreement that the insurers should be content with such salvage as the sum insured bore to the whole interest, the insured should not be obliged to refund, but the insurer should stand in his place for the salvage.

Da Costa v. Firth,
4 Burr.
1966.
Vide ante,
c. 6. p. 167.

So also in the case of *Hamilton v. Mendes*, the fact of the capture and recapture having come to the knowledge of the assured at the same time, Lord *Mansfield* in delivering the opinion, expressly reserves to the court a clear right to decide, without being at all fettered by the case then in judgment, upon the point as a new one, *when the ship or goods insured should happen to be restored between the time of the offer to abandon, and the*

the time of the action brought. "For," said his Lordship, "we give no opinion how it would be, in case the ship or goods were restored in safety, between the offer to abandon, and the action brought : or between the commencement of the action, and the verdict." The former of these points, namely, the restoration of the property after an offer to abandon, upon the supposition of capture, and the time of bringing the action, came on lately for consideration, for the first time, in the following case ; and as the judgment was very ably pronounced, I make no apology for giving it in detail.

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See ante,
p. 212.

It was an action on a policy of insurance on the ship called the *Mary*, valued at 6000*l.* at and from *Liverpool* to any port or ports in *Jamaica*, during her stay there, and from thence to her port of discharge in *Great Britain* (the rest of the policy is not material). There was another count upon a policy on freight valued at 4000*l.* upon the same voyage. At the trial, before Lord *Ellenborough*, the following facts were found. The ship sailed from *Jamaica* with a cargo and freight bound to *Liverpool*. On the 21st of *September* she was captured during her homeward voyage by an enemy. On the 25th day of the same month she was recaptured. On the 30th day of *September*, the plaintiffs received intelligence at *Liverpool* of the capture, but not of the recapture, and on the day following, communicated the same to the underwriters, and gave notice of abandonment. On the 2d day of *October* intelligence of the capture was confirmed. On the 6th of *October*, five days after the notice of abandonment, the plaintiffs received the first intelligence of the recapture of the vessel, and that she then lay at *Loch Swilley* in *Ireland*, in safety, in the possession of the recaptors. This intelligence was immediately communicated to the underwriters, with notice that the plaintiffs nevertheless persevered in their abandonment ; but offered to do their best for the benefit of those, who should ultimately be concerned and interested in the vessel, without prejudice. Under such offer, and by agreement with the underwriters, without prejudice to either party, the plaintiffs have compromised with the recaptors ; the vessel has been restored, and has arrived at *Liverpool*, being her port of discharge according to the terms of the policy, where she now is in safety. And the owners have also without prejudice received

Bainbridge,
and another
v. Neilson.
Mich. 49.
Geo. III
10 East.
P.

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the freight of the goods on board her, and the proportion of salvage and expences of such goods. The plaintiffs obtained the possession of the vessel at *Loch Swilley* under the said agreement, after the notice of abandonment, but before the action was brought; and the vessel did not arrive at *Liverpool* till after the commencement of the action. The ship was never taken into an enemy's port, not did she sustain any damage, whilst in possession of the enemy. The amount of the salvage, damages and charges upon the ship is 15*l.* 4*s.* 8*d.* and upon the freight, 13*l.* 11*s.* 5*d.* *per cent.* on the sum insured. The defendants paid to the plaintiffs before the commencement of this action 57*l.* 12*s.* 2*d.* being the amount of their proportion of an average loss upon the two policies, which the plaintiffs accepted, without prejudice to their claim of a total loss upon their abandonment. This case was fully argued at the bar, and then,

Lord *Ellenborough* said—" This case, though new in specie is by no means new in principle: and though Lord *Mansfield*, in *Hamilton v. Mendes* said, that he would not decide how the case would be, if the ship and goods were restored in safety between the offer to abandon, and the action brought; yet there can be no doubt what his decision would have been, if the facts of this case had been brought in judgment before him. The facts of the case are, &c. (here his Lordship stated the facts of the case as above related.) Now the question is, whether that, which in the result turns out to have been only a partial loss, and that to a trifling extent, shall, because of the notice of abandonment, which was given under the supposition at the time that it was a total loss, be now recovered against the underwriters as a total loss, after it is ascertained to be only a partial loss? To give effect to this claim would be grievously to enlarge the responsibility of underwriters, and to make them answerable not for the actual loss sustained by the assured, whom they have engaged to indemnify against the risks in the policy; but for a supposed total loss at the time of the notice to abandon, when that total loss, as it was supposed, had in fact ceased to exist. But it has been contended by the plaintiffs' counsel, that if the abandonment is once well made, a right of action thereby becomes vested, which cannot be divested by subsequent events. That proposition is not only not true in the whole, but is not true in any of its parts. The true effect of a notice of abandonment is
only

only this, that if the offer to abandon turns out to have been properly made, upon the supposed facts, which turn out to be true; the assured has put himself in a condition to insist on his abandonment. But it is not enough that it was properly made upon facts supposed to exist at the time, if it turn out that circumstances existed, unknown to the parties, which did not entitle the assured to abandon. The notice would be properly given, upon intelligence received, and really credited by the assured, of the ship's being wrecked, whether that intelligence were true or not, and although the letter conveying the intelligence should turn out to be a forgery: and yet it is clear that no right of action would vest, founded upon such abandonment, thus made upon false intelligence, without any fact to support it. What is the notice of abandonment more than this: *that the assured, having had notice of circumstances, which entitle him, if true, to treat the adventure as a total loss, in contemplation of those existing circumstances, casts what is considered as a desperate risk on the underwriter?* But does not all that presume the existence of those facts, on which the right results to him of calling upon the underwriters, to indemnify him? But if all this turns out to be a misconception; if, at the time, it had ceased to be a total loss, and no damage had happened; or if the only damnification arises out of the very act, which has saved the thing insured from total loss, namely, the salvage on the recapture, the whole foundation of the abandonment fails. It was then argued, that if the right of abandonment once vested, and was acted upon in time, it cannot afterwards be divested by subsequent intelligence of other circumstances and events: but the case of *Macarthy v. Abel* is an authority to the contrary; for there, though notice of abandonment were well given at the time, yet it was divested by subsequent circumstances, where it appeared that the cause of the abandonment had ceased to exist.

5 East p.
385. & post.
in this
chap.

"Next it is contended, that by the ship's being carried into a port of Ireland out of the course of her voyage, after her recapture, the right of abandonment revived. I do not, however, understand, whether this is insisted upon as an entire and distinct cause of abandonment, or as connected with the capture and recapture. If it grew out of the recapture, let us see what Lord Mansfield says of it in *Hamilton v. Mendes*. "The third point depends, as every question of this kind must, on

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“ the particular circumstances. It does not necessarily follow
 “ that, because there is a recapture, therefore the loss ceases
 “ to be total. If the voyage be so defeated, as not to be worth
 “ the further pursuit.” Here no voyage is lost or defeated, for
 the voyage is performed. “ If the salvage be high.” Here it is
 not so, but very trifling. “ If the other expence be great, and
 “ the underwriter refuse to bear them.” Here the expences
 are not great, and the actual loss has been paid by the under-
 writers into the hands of the assured. If, indeed, after the re-
 capture, the ship had been carried into a port abroad, and the
 sale had become inevitable, because no person would indemnify
 the recaptors for their one-eighth salvage, that might have made
 it a total loss: but that is not the present case; and therefore
 none of the circumstances put by Lord *Mansfield*, which, after
 a recapture, might still make the loss total, exist in this case.
 I cannot, however, but consider, as at present advised, that the
 abandonment must be taken generally, as relating only to the
 actual state of things, at the time of the abandonment made;
 and if necessary to the decision of this case, I should wish to
 have that point fully considered. I am not disposed to enlarge
 the grounds of abandonment against underwriters, a privilege,
 which, every one knows, has been much abused. In almost
 every case of a valued policy, it is the interest of the assured to
 abandon: and it therefore becomes the court to watch every
 such case; and in no instance to enlarge that, which in its nature
 is only a partial into a total loss. In *Macarthy v. Abel*, it might
 as well have been said, that having been once a total loss, it was
 to continue a total loss: but it was held otherwise, and that case
 is no otherwise distinguishable, except eventually *that* turned out
 to be no loss; and this is only a partial loss. But I can see no dif-
 ference, whether it ceased, by subsequent events, to be a total loss
 altogether; or whether it was reduced by the events to so minute
 a loss as in the present case. Then, as in the case of *Godsal v. Boldero*,
 we look to the real nature of the contract in a policy of insurance:
 and there it was considered to be, as it is, a mere contract of in-
 demnity. Therefore, though in that case, there was a total loss
 with respect to the subject matter of the risk insured, yet circum-
 stances having afterwards intervened, which addeemed the loss
 of the insured, he was held not to be entitled to recover. So here,
 as that which was supposed to be a total loss, at the time of the no-
 tice of abandonment first given, had ceased to be so, and in the
 event

9 East p.
72. & post.
ch. 22.

event only a small loss has been incurred, that is the real amount of the damnification under this contract of indemnity; and that has been paid by the underwriters." C H A P.
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The three other judges, *Grose*, *Le Blanc*, and *Bayley*, delivered their opinions concurring with his Lordship: and judgment was pronounced for the defendant.

It has been already said, and from the preceding cases it seems to be a necessary inference, that in order to entitle the owner to abandon, there must, at some period or other of the voyage, have been a total loss; for he cannot be allowed to turn a partial into a total loss. There was, however, a modern case, in which this was the single point to be determined.

It was an action on a policy of insurance upon the ship *Friendship*, from *Weyburgh* to *Lynn*, subscribed by the defendant for 100*l.* at two guineas *per cent.* The defendant pleaded a tender, and paid 48*l.* into court. The cause was tried at *Guildhall*, before Mr. Justice *Buller*, when a case was reserved for the opinion of the court, stating that the damages sustained by the ship in the voyage insured, did not exceed 48*l. per cent.* which sum the defendant had paid into court, upon pleading in the action. That when the ship arrived at the port of *Lynn* she was not worth repairing. The question for the opinion of the court was, Whether the plaintiffs had a right to abandon?

Casalet and others v. St. Barbe, 1 Term Rep. p. 137.

This case came on to be argued when Lord *Mansfield* was absent.

Mr. Justice *Willes*.—"The question is, Whether, under these circumstances, the plaintiffs had a right to abandon? or, in other words, Whether they can turn a partial into a total loss? The finding of the jury in this case determines the question, because it is expressly found that the damage did not exceed 48*l. per cent.* The case then states, that the ship was not worth repairing, but no mention is made of what was her real worth; so that the remaining materials of the ship, if sold, may make up the difference between 48*l.* and 100*l. per cent.* There has been no loss either of the ship or of the voyage; but, being an old ship, she suffered so much that she was not worth repairing. I cannot now determine that there was a total loss, when the jury

C H A P. IX. jury have already said that there 'was only a loss of 48l. per cent. As to the case cited of *Bond v. Hunter*, this question never occurred in it. The action was brought upon the homeward-bound policy; and it was sufficient to say, that that policy never attached, for the ship had received her death's wound in her outward-bound voyage. In the case of *Milles v. Fletcher*, a total end was put to the voyage. In the other cases, the questions arose upon losses which had happened during the several voyages; here the voyage has been performed, and the ship is arrived; and after the jury have found that the damage sustained did not amount to more than 48l. per cent. the court are precluded from saying it is a total loss."

Wide supra.

Mr Justice *Ashurst*.—"The facts found in this case preclude any question, Whether this can be construed to be a total loss? If the insurers should be held liable here, it would be making them insure the goodness of the ship; and if the owners can recover as for a total loss in this case, they might equally have recovered on account of the bad condition of the vessel, though she had not received much damage at sea. It is not stated that the ship received her death's wound in the course of her voyage. When she came into port it was found she was not worth repairing; but *non constat* if she had not received any damage during the voyage, she would have been worth repairing. And though the vessel was not in a sound state, yet she had arrived in safety twenty-four hours; and the jury having exactly defined what degree of damage she had sustained, we cannot say that the plaintiff ought to recover any more."

Mr. Justice *Buller*.—"Nothing can be better established than that the owner of a ship can only abandon in case of a total loss. The cases which have been cited went upon that ground. In the case of *Jenkins v. Mackenzie*, though the ship was brought into port, yet the capture, as between the assurer and assured, was a total loss. But *there is no instance where the owner can abandon, unless at some period or other of the voyage there has been a total loss*. No such event has happened here; for the jury have expressly found, that the loss amounted only to 48l. per cent. Even allowing *total loss* to be a technical expression, yet the manner in which the plaintiff's counsel has stated it, is rather too broad. It has been said, that the insurance must be taken

taken to be on the ship as well as on the voyage; but the true way of considering it is this: *it is an insurance on the ship for the voyage.* If either the ship, or the voyage be lost, that is a total loss; but here neither is lost. The case of *Hamilton v. Mendes* is decisive." Judgment for the defendant.

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Vide supra.

In another case, an action was brought on a policy of insurance on the *Prince of Wales*, in port or at sea, for six months, from the 18th July 1777. The ship in question was in government service, bound from *Cork* to *Quebec*. She arrived there, but the season being too far advanced before she was ready to return, she was removed into the basin: but, on the 19th November, she was driven from thence by a field of ice, and damaged by running on the rocks. The condition of the ship could not be examined till April following, after the expiration of the policy. She was then, however, found to be bulged and much injured, but not thought irreparably so. In the progress of the repair, difficulties arose for want of materials; and the captain, after consulting the merchants and agents in the country, sold her. An account was made up, charging the insurers with the whole amount, and crediting them with the sums for which the ship sold, as salvage.

Furneaux
v. Bradley,
Easter,
30 Geo. III.

Lord Mansfield, at the trial, said: "The great point in the cause is, Whether this is a total loss by this accident? It is a new question: upon which I shall reserve a case for the opinion of the court." After argument by counsel on both sides, his lordship said, the justice of the case seemed to be, that the loss in November should be taken as an *average*, not a *total* one; and that the whole court were of opinion, that the ship should be considered as damaged on the 19th of November, but not *totally* lost.

In a subsequent case before Lord Kenyon, at *Nisi Prius*, it was held in an action on a policy for *six months*, where the ship had been captured and carried into *Charlestown*, sold by the captors, by authority of the *French* consul there, and purchased by the captain for account of the original owners, that this was only to be considered as a partial loss, and that the owners could not abandon, Lord Kenyon being of opinion that the captain was agent for the owners, recovering the vessel upon their account,

M'Masters
v. School-
bred, Sitt,
at G. H.
after Mich.
15 Geo. III.
Espinasse's
Cases at
N. P. 237.
S. C.

and

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and paying a kind of salvage, the amount of which would be the loss sustained, and which only constituted an average loss. His lordship, however, admitted, that when the ship had been captured and carried into port in the enemy's possession, the assured at that period might have abandoned. But not having done so till the vessel was recovered, they could now only go for an average loss.

When the case of *M' Masters v. Schookred* was before the court at *Nisi Prius*, it did not occur to the counsel for the defendant to object, that the act of the *French* consul was illegal, and contrary to the law of nations: and consequently that the money paid by the original owners, there being no sentence of condemnation, was in the nature of a ransom; and that ransoms being positively prohibited by the statutes of 22 *Geo. III.* ch. 25. and 33 *Geo. III.* ch. 66. s. 37, 38, & 39, the money paid by an assured for the ransom could not be a charge upon the underwriter. But in a subsequent case, where this objection was taken, and a case reserved upon it for the opinion of the court, the whole court, after two arguments, were unanimously of opinion that the objection was well founded; that money paid by an assured under those circumstances was a ransom; and consequently could not be recovered from the underwriters.

Havelock v.
Rockwood,
5 Term Rep.
p. 268.
See ante,
p. 91. and
post. ch. 18.

These cases, and the judgments upon them, have been cited at length, because the principles of abandonment are so clearly and accurately defined, and are so aptly illustrated by referring them to the particular circumstances arising in those causes; that it would be absurd to insist more upon the subject; as the reader must from them be able to collect every thing relating to abandonment. Nor let it be objected, that those were almost all cases of abandonment after a capture; for many of the rules there laid down were general in their nature, comprehending cases of wreck, and detention, *mutatis mutandis*, as well as those of capture. This will be best explained by putting two possible cases.

2 Burr. 696. Suppose a neutral ship is arrested, and detained by a foreign prince by an embargo, the owner immediately, upon hearing of this accident, would have a right to abandon; because no man is bound to wait the event of an embargo. But if the same

ship that brings an account of the embargo, should also inform him, that the embargo was taken off, that the ship had only been detained two or three days, that very trifling or no damage had arisen, then it is impossible to say that the merchant may abandon; because, as we have seen, it is a principle of good sense, that a man cannot make his election, whether he will abandon or not, till he receive advice of the loss; and if by the same conveyance, it appear that the peril is over, and the thing insured is in safety, he has lost his election entirely; because he has, and can have no right to abandon when his property is safe.

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2 Burr.
1811.

The same principle governs in the case of wreck; for let us suppose a trunk of bullion, as in the case of *Da Costa v. Firth*, to be the property insured; and that, the ship being wrecked, this trunk of course goes to the bottom; the owner would instantly be entitled to abandon to the underwriter, and to call upon him to contribute as in case of a total loss. But if it should so happen, that before the action was brought, or before the offer was made to abandon, the bullion should be recovered, and restored to the owner at the place of destination, upon paying a moderate salvage; in that case it would fall within the rule of *Hamilton v. Mendes*; and the assured would only be entitled to recover an indemnity, according to the nature of his case at the time when the action was brought; consequently he would not be allowed to abandon.

4 Burr.
1966.

But it has been settled also by a solemn decision of the court of *King's Bench* in what cases a loss shall be deemed to be total, after an accident by perils of the sea. A policy was effected in London upon the ship *Grace*, her "cargo and freight, at and from Tortola to London, warranted to depart on or before the first of August 1781. The ship valued at 2,470*l.*, the freight at 2,250*l.*, and the cargo at 12,400*l.* At a premium of 25 guineas *per cent.* to return 10 *per cent.* if she depart the *West Indies* with convoy for *England* and arrives." At the head of the subscriptions is the following declaration, *viz. on ship, freight, and goods, warranted free of particular average.* This ship, with her cargo, was a Dutch prize taken by a privateer of Tortola, and was there condemned; during the whole of her stay at Tortola,

Manning v.
Newham,
Trin. Term,
22 Geo. III.

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tola, (four or five months,) she was never unloaded. On the first of *August* the whole fleet of merchantmen got under way, under the convoy of the *Cyclops*, &c. but not being able to get clear of the islands that day, they cast anchor during the night, and the next day got clear of the islands. About 10 o'clock on the 2d of *August*, several squalls of wind arose, which occasioned the ship to strain and make water so fast, that the crew were obliged to work both pumps; and, on the third, the captain made a signal of distress: in consequence of which, she was obliged to return to *Tortola*, under protection of one of his majesty's ships. The captain made his protest, and a survey was had, by which the ship was declared unable to proceed to sea with her cargo, and that she could not be repaired in any of the *English* islands in the *West Indies*: and that many of the sugars in the bilge and lower tier were washed out, and several of the casks broke and in bad order. The ship and the whole of the cargo were sold accordingly at *Tortola*. The assured claim a total loss of ship, cargo, and freight, which the jury thought right; and found accordingly. A motion was made for a New Trial, which upon full consideration was refused.

Lord *Mansfield*, after stating the evidence, and that his prejudices at the trial were in favour of the underwriters, proceeded thus: "but notwithstanding this inclination of my opinion, upon full consideration we think the jury have done right. If by a peril insured the voyage is lost, it is a total loss; otherwise not. In this case the ship has an irreparable hurt within the policy; this drives her back to *Tortola*, and there is no ship to be had there, which could take the whole cargo on board. There were only two ships at *Tortola*, and both could not take in the cargo. To shew how completely the voyage was lost, and that no ship could be got, the assured have not been able to send that part of the goods, which they purchased, forward to *London*. It is admitted there was a total loss on the freight, because the ship could not perform the voyage. The same argument applies to the ship and cargo. It is a contract of indemnity; and the insurance is that the ship shall come to *London*. Upon turning it in every view, we are of opinion that the voyage was totally lost, and that is the ground of our determination." The rule was discharged.

Where a *neutral* ship bound from *America* to *Havre* was detained and brought into a *British* port for the purpose of search; and pending proceedings in the Admiralty, the king of *Great Britain* declared *Havre* in a state of blockade, by which the further prosecution of the voyage was prohibited; this was held to be a total loss of the voyage, which would entitle the *neutral* assured to abandon, and to recover as for a total loss. But not having given notice of abandonment in due time, he could only recover for a partial loss.

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Barker v. Blakes.
9 East, 283.
See for another point this case at the end of this chap. and also at the end of chap. 12, on illegal voyages.

But in all the cases lately quoted and commented upon, it will be seen, that to justify an abandonment, the loss must be occasioned by one of the perils in the policy, and therefore although a loss by wreck or capture, by an arrest or detention of princes, is perfectly understood in the law of *England*, yet it has been held not to be a loss within the policy, for which the assured can abandon, and recover as for a total loss of cargo, that the port of destination has been shut by order of the enemy against ships of the nation to which the ship insured belongs, although the cargo was fish, and although it was obliged to be sold at another port for a very small price. As this is one of the leading cases upon the subject, I shall lay it before the reader the more largely on that account.

It was an action on a policy of insurance on *Pilchards*, on board the *Pakaro*, at and from *Mount's Bay* in *Cornwall* to *Naples*, with leave to join the convoy at *Naples* or elsewhere. The policy contained the usual memorandum, exempting the underwriter from average losses on fish, &c. unless general, or the ship be stranded. The declaration stated the loss to be, "that after the loading of the said *pilchards* on board, &c. the said ship or vessel with the *pilchards*, &c. &c. departed and set sail from the said port of *Penzance* aforesaid, on her said intended voyage in the said writing and policy of insurance mentioned, and afterwards, and whilst the said ship was so sailing and proceeding on her said voyage, and before her arrival at *Naples*, to wit, on, &c. the port of *Naples* aforesaid, was by the persons exercising the powers of government in the kingdom of *Naples*, shut against all ships the property of any of the subjects of our Lord the King, or sailing under the colours

Hadkinson v. Robinson.
3 Bos. & Pul. 382.

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“ colours of our Lord the King, and against all merchandize, the property of any such subjects, carried in such ships, under the pain of such ships and merchandize being confiscated by the persons exercising the powers of government in the kingdom of *Naples*, whereby the said ship with the said pilchards on board (the said ship being then and there the property of subjects of our Lord the now King, and sailing under the colours of our Lord the now King, and the pilchards being then and there the property of the plaintiff, who was then and there a subject of our Lord the now King), was then and there prevented from pursuing her voyage to *Naples* aforesaid, and the voyage was thereby then and there wholly defeated and lost, and the pilchards then and there became of no value to the plaintiff.” At the trial before Lord *Alvanley* it appeared amongst the other facts, that after this vessel failed from *Lisbon*, in the prosecution of her voyage, she received intelligence that *English* vessels were excluded from all the ports of *Naples*: and that afterwards the commander of the convoy ordered, that all vessels destined for *Naples* or *Sicily* were to proceed to *Port Mahon*, where the report respecting the state of the ports of *Naples* was confirmed. That in consequence of this, a survey of the cargo was taken under the direction of the Vice-Admiralty court of *Minorca*, and sold there for a small sum of money. The assured abandoned to the underwriters, who refused to accept it. The jury found a verdict for the underwriters, to set aside which a motion was made in the following term. After argument at the bar and time taken to deliberate,

Lord *Alvanley* delivered the judgment of the court confirming the verdict of the jury. His Lordship said, “ The question is, Whether the circumstances, which have happened, amount to a total loss within the policy? The policy includes capture and detention of princes, and any loss, which necessarily arises from such acts is a loss within the policy. But it has appeared to me, that where underwriters have insured against capture and restraint of princes, and the captain, learning that if he enter the port of his destination, the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating to the destruction of the thing insured. If they could, the
same

same principle would have applied in case information had been received at *Falmouth*, that the ship could not safely proceed to *Naples*. In *Goss v. Withers*, *Hamilton v. Mendez*, and *Milles v. Fletcher*, the principles, by which a total loss is to be ascertained, are clearly laid down. It is there said, "that if the voyage be lost, or not worth pursuing, if the salvage be high, if further expence be necessary, if the insurer will not at all events undertake to bear that expence, &c. the insured may abandon, notwithstanding a recapture." But the doctrine thus laid down is only applicable to cases in which the loss is occasioned by a peril insured against, which, as it appears to me, must be a peril acting upon the subject immediately, and not circuitously, as in the present case. Without entering, therefore, into the question which has arisen in another case (See *Dyson v. Rowcroft* ante, p. 153), I think that the detention of the cargo on board the ship in a neutral port in consequence of the danger of entering the port of destination, cannot create a total loss within the meaning of the policy, because it does not arise from a peril insured against. This is an insurance upon an article from *England* to *Naples*, warranted free from particular average. The plaintiff, therefore, cannot recover, unless the article be totally lost by a peril within the policy, and such peril must, as I think, act directly and not collaterally upon the thing insured. I much doubt, whether, if a verdict had been found for the plaintiff, judgment might not have been arrested. With respect to the case of *Manning v. Newnham* it may be observed, that Lord Mansfield expressly decides it upon the ground of the voyage being lost by one of the perils insured against, namely, by tempestuous weather. The words of Lord Kenyon in the case of *McAndrews v. Vaughan*, in which he lays down that the insured may recover for a total loss, if the voyage be lost, must be taken with reference to the case before him, in which the injury arose from capture. The case of *Cocking v. Fraser*, (ante, 151.) is an extremely strong authority to shew that if the article insured (being one of those mentioned in the memorandum) remain in specie, the assured cannot recover, though it be rendered totally useless, and never reach the port of destination. But that case did not involve the question, on which this case turns, namely, whether the loss was occasioned by a risk within the policy. Here, without entering into the question, how far

C H A P. IX. the cargo was totally lost, the claim made by the assured arises from the ship not proceeding to that port to which she was destined. Had she proceeded to *Naples*, the loss insured against might have arisen. If we were to decide that the sale at *Port Mahon* was a total loss within the policy, it would afford to owners insuring cargoes of the description specified in the memorandum, the opportunity of creating imaginary dangers whenever the cargo was not likely to reach the port of destination in a sound state, and by giving notice of abandonment to throw a loss upon the underwriters, to which they are not liable by the terms of the policy. We are of opinion the verdict was right.

Lubbock v.
Rowcroft,
5 Eip. R.
50.

A similar case, except that the cargo was not of a perishable nature, came before Lord *Ellenborough*, who said, that if such a loss, as the shutting a port against vessels of the nation to which the ship belongs, was allowed, every ship about to sail from the port of *London* for a port which had fallen into the hands of the *French*, might be abandoned. The plaintiff being nonsuited upon another ground, it never came again before the court.

Blanken-
hagen v.
London As-
surance Co.
Sittings bef.
Mich. 1808.

A decision upon similar principles was made by Lord *Ellenborough* in the following case. The insurance was on goods on the ship *William*, at and from *London* to *Revel*. The ship sailed from the *Nore* under convoy of the *Forrester*, sloop of war, for the *Sound*, and arrived there on the 27th of *October* 1807. The ship proceeded from thence towards *Revel*, on the 15th of *November*, under convoy of the *Garnett* sloop of war. On the 17th of *November*, whilst the ship was proceeding on her voyage with the convoy, it became known to the convoy, that an embargo was laid on all *British* ships in *Russian* ports; and in consequence thereof the ship, under the orders of the convoy, returned to *Copenhagen* roads on the 18th of the same month. The ship *William*, together with the convoy, afterwards proceeded to lay off *Gottenburgh*, a *Swedish* port, for six days; and the ship insured might have gone into that port, if the captain had so thought fit, *Sweden* being then at war with *Russia*, but in amity with this kingdom. The ship sailed from off *Gottenburgh* the 30th of *November* 1807, with the *Garnett* and fleet for *England*, with the additional convoy of the *Spitfire* sloop of war. The ship *William* was last seen on the 3d of *December* 1807, distant

ten leagues from the *Naze* of *Norway*, when the sea ran high, and not having been since heard of, she was admitted to be lost. Hostilities between this country and *Russia* commenced on the 18th of *December*, and between this country and *Denmark* in the preceding *September*.

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Lord *Ellenborough* told the jury that this was a contract for the voyage out, and that although a ship *from necessity* might be allowed to take a circuitous course, yet the ultimate point of destination must ever be the same. That *such a necessity* might perhaps even justify a return to *England*, if it could be proved satisfactorily, that it was the intention of the parties to seize the first favourable opportunity of returning to *Revel*. No such evidence appears in the present case. Neither does it appear that the convoy compelled the return to *England*: for although the first part of the case states that the return to *Copenhagen* roads was *under the orders of convoy*, the return to *England* is not averred to be under such compulsion, I must therefore take this to be a voluntary abandonment of the voyage. And at all events, even if there had been an intention to return to *Revel*, war intervened before such an intention could be executed, and that would put an end to the contract. The plaintiff was nonsuited.

In the beginning of this chapter, in stating the nature of an abandonment, the effect of it was necessarily explained: namely, that when the assured claimed a total loss, he must cede or abandon whatever is saved, or whatever may be recovered, to the underwriter, and who, when the transfer is made to him, stands in the place of the assured, and thus, by the transfer, becoming entitled to all the benefit and advantage which the assured himself could have claimed, if his property had been uninsured. But the very peculiar circumstances, which have in many cases occurred during the present war, have led to a variety of discussions upon this subject. Amongst others, the late emperor (Paul) of *Russia* having in the month of *November* 1800 laid an embargo on all *British* shipping then in the *Russian* ports, most of which, being then laden for their homeward voyage, he compelled to unload, and having again taken off the embargo in *May* 1801, and allowed the same cargoes to be re

loaded

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loaded and sent to *England*, a considerable question arose between the two sets of underwriters on ships and freight. The owners had often insured the *ships* with one set of underwriters, the *freight* with another; and in *February* 1801, when the news of this embargo reached *England*, losses to a considerable amount were paid, the assured abandoning the *ships* to the underwriters on *ships*, the *freights* to the underwriters on *freight*. But afterwards, when the embargo was taken off, when the ships arrived, and the freights were earned and paid to the owners, the question was, whether the abandonment of the ship conveyed to the *insurer on ship* the freight she had earned; or whether it went to the *underwriter on freight*, to whom also an abandonment had been made.

4 Emerigon,
221.

3 Marshall,
1st Edit.
310.

In *France*, no difficulty could well arise upon such a subject; because insurances on ship and freight are not known as distinct subjects of insurance. But that not being the case in *England*, and the question being of considerable difficulty, and, in point of value, of great magnitude, it has been the subject of much discussion. A learned author has stated it as clear, "that the abandonment of the ship in *England* does not transfer the freight she has earned." But it conflicts with my own professional knowledge to state, that that opinion was far from being universal; and that there never was a question of insurance law, in my memory, on which a greater contrariety of opinion obtained at the *English* bar. Where such a difference did prevail, it was likely that the case should be brought before the court; and the course adopted by the learned Judges shews how difficult a question it appeared to them to be: for I think, upon a review of the following cases, it will appear, that they have always been decided upon collateral grounds, applicable to each particular case; and have always left the rights of the two sets of underwriters undisposed of. But I am bound to acknowledge, that, as far as the opinion of the court could at all be collected, the inclination seemed to be against the claim of the underwriter on freight, as between him and the underwriter on ship. I therefore do not presume to hazard an opinion, where in such judgments the question is so difficult.

Thompson
v. Row-
croft,
4 B. & C., 34.

The first in order came before the court of King's Bench, in an action by the underwriter on freight against the owner of
the

the ship. His declaration stated, that the defendant was owner of three-fourths of the ship *Thezeus*, which had been chartered by him to one *Sanders*, to proceed to *Riga* for a quantity of masts, and to return therewith to *Portsmouth*, for which certain freight was to be paid. That the defendant caused the freight to be insured, and that the plaintiff subscribed the policy for 150*l*. That the ship arrived at *Riga*, was there loaded, and had nearly completed her cargo, when, in Nov. 1800, the ship was arrested, restrained, and detained by the Russian government, at *Riga*, and the cargo was unladen and kept under the authority of the same government; and that, on the 11th Feb. 1801, upon intelligence of the loss arriving in *London*, the defendant applied to the plaintiff, and the other underwriters on freight, requiring them to pay a total loss, and abandoning to them their interest in the freight insured. The declaration then stated, that, in consideration of the premises, and that such payment of the loss should be made within one month, defendant promised, on such payment being made, to assign all right of recovery and compensation of and in the freight to one *W. D.* and the plaintiff, in proper form, for the benefit of the underwriters. That payment of the loss was duly made to the defendant: that afterwards, in May 1801, the arrest, &c. of the said ship was withdrawn by the Russian government, and the ship and cargo liberated, and the cargo put on board the ship, and the said ship proceeded to *Portsmouth*, and delivered her cargo to *S. Sanders*; and the defendant thereupon received the freight of the same to the amount of 1857*l*. and that the plaintiff's interest therein was 150*l*., yet that the defendant had not made any assignment for the benefit of the underwriters on freight. The cause was tried before Lord *Ellenborough*, when a verdict was found for the plaintiff, subject to the opinion of the court on a case, which stated the preceding facts, and also that the ship had been insured; and that, on hearing of what had passed in *Russia*, the respective underwriters paid their total losses, and the following indorsements were made on the policies. That on the ship was in these words: "Agreed to settle a total loss of 100*l*. per cent. the ship being detained and seized at *Riga*, and the owners to account, to the underwriters, for the ship, if restored to, or received by them, or to make, at the expence of the underwriters, a proper assignment of their interest, in proportion to the sum insured. *London*, 19th January, 1801." And on that

C H A P. *on the freight*, "the interest in the freight insured by this policy
IX. "being abandoned to the underwriters, as far as their subscrip-
"tions on the same, and payment of the loss being agreed to
"be made in one month, as customary, it is agreed, on such pay-
"ment being made, to assign all right of recovery, compensa-
"tion, &c. to H. T., W. D. and T. R. for the benefit of," &c.
And the defendant signed the following agreement: "In con-
"sideration of the underwriters having accepted an abandon-
"ment of the ship *Thezeus*, &c. and having agreed to pay a total
"loss thereon, I do hereby promise, on payment of the same, to
"make over to them or their assigns, at their expence, an assign-
"ment, in a reasonable and proper form, of their interest and
"proportion of the same. *Thomas Rowcroft*." No assignment
has been executed either of ship or freight. The defendant
has received the freight, and has been called upon by the
plaintiff to make an assignment for his benefit according to the
abovementioned indorsement on the policy on freight: but the
underwriters *on the ship* insist that they are entitled to the
freight, and have given the defendant notice of such claim;
and he therefore does not think himself justified in paying the
plaintiff without the sanction of the court.

It is observable from this statement that the intention of the parties here was to procure a decision of the court upon the general question, whether the underwriters on ship or freight were entitled to what may be deemed the salvage *on the freight*: and it was so considered at the bar on the first argument, treating the defendant as a mere stakeholder, and the question as being in truth between the underwriters *on the ship* and those *on the freight*. But at the recommendation of the court, the second argument was narrowed to the consideration of the question upon the specific agreement between the plaintiff and the defendant: and on this ground alone the case was ultimately decided. The defendant's counsel were of course to contend as to the general question, that the underwriters on ship were entitled to the earnings of the ship: but

Lord *Ellenborough* said, "If the rights of the respective sets of underwriters on the ships and on the freight clashed in this case, and if it had been a question of priority between the two, who were litigating for payment out of the same fund, I should have

have gone with the defendant's counsel in a great part of their argument ; but here the litigation is by one of the sets of underwriters with the assured, who has made a specific contract with each of them, by which he must be bound. And therefore, in my present view of the subject, the right of property in the subject-matter may be in the underwriters on the ship, and yet the defendant may be liable to the underwriter on the freight in this action. The plaintiff contracted with the defendant to insure his freight ; an event happened which entitled him to abandon it to the plaintiff : the plaintiff accepted the abandonment, and has paid the defendant as for a total loss of the freight. The defendant has since received the freight ; and yet he refuses to pay it over to the plaintiff in pursuance of his undertaking. To be sure he is liable." Judgment for the plaintiff.

In the very same term (*Trinity*, the 43d *George III.*) a special case, the facts of which were substantially the same, received a similar decision. The declaration in that case was merely for money had and received to the use of the plaintiff's testator, who had been an underwriter on freight of the ship *Manchester*. The court took time to consider of the point, and then Lord *Alvanley* said, " We have enquired into the circumstances of the case lately decided (*Thompson v. Rowcroft*) in the King's Bench, upon the same subject, and find they do not materially differ from the present. Here the assured, in consideration of being paid for a total loss upon the ship, agreed to assign over all their right and interest in the ship : after which they agreed with the underwriters on freight, in consideration of being paid a total loss of the freight, to assign over to them, " *all their right and title* to all future benefit that might occur thereafter, except as insurers therein." The ship having arrived and earned freight, the defendants, who are the assured, received the whole, as if they had never abandoned : and the question now is, whether, in an action for money had and received to their use, the underwriters or freighters are not entitled to demand what the assured have received ? The court of King's Bench, in deciding the case before them, were of opinion, that the assured had bound themselves to account to the underwriters on freight for all the freight they might receive :

Leatham,
Executor,
v. Terry,
3 *Bos. &*
Pull. 479.

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but in giving judgment they expressly declared, *that they did not intend to decide the question between the underwriters on the ship and the underwriters on the freight. We shall take the same course; and though the case has been argued as if it were a question between the two sets of underwriters, we desire not to be understood as giving an opinion upon such a case.* We only determine that the defendants have made themselves responsible to the plaintiffs, in this form of action, for the freight which they have received. Judgment for the plaintiffs.

In the next case which came before the Court, the general question could hardly fail to be discussed, especially as the Court itself, at the close of the first argument, desired that the second might be confined to the consideration of the effect of an abandonment of a ship upon the right to the accruing freight.

McCarthy
and others
v. Abel,
5 East's R.
388.

It was an action brought on a policy of insurance *on freight* of the ship *Thomas*, upon a voyage at and from *Riga* to *Cbatam*, &c. At the trial, before Lord *Ellenborough*, a verdict was found for the plaintiffs for 200*l.* subject to the opinion of the Court on the following case. That the plaintiffs, being owners of the ship, chartered her to *Thorntons* and *Smalley*, for the voyage insured, for which freight was to be paid in certain proportions (restraints of princes and rulers during the voyage excepted). On the ship's arrival at *Riga*, she was supplied with a cargo, and nearly the whole thereof had been taken on board, when an embargo (*November 1800*) was laid on all the *British* shipping in the port of *Riga*. The case then states the relanding of the cargo, the abandonment to the underwriters *on freight* on the *11th January 1801*, *of their interest in the freight*, and demanded a total loss. And on the same day they *abandoned the ship to the underwriters on ship*. The case further states the restoration of the ship by *Russia*, the reloading of the ship, and the earning of the freight, which was paid by the freighters to the agent for the underwriters *on ship*, under an indemnity from them against any claims which might be made thereto, either by the plaintiffs or by the underwriters on freight. The plaintiffs had duly assigned over by indenture, in *February 1801*, the ship *Thomas*, and all the interest, property, claim,

claim, or demand of the plaintiffs in, to, or out of the said ship and her appurtenances to two persons, in trust for all the underwriters on the ship. C H A P.
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After two arguments, and time taken to deliberate, Lord *Ellenborough*, Chief Justice, delivered the judgment of the Court.—“The novelty of the question in this case, the value of the property, and the extent to which some of the principles laid down in the argument seemed to lead, made us desirous of every information on the different points which might arise between the several parties interested, before we came to our decision; and, therefore, we wished for a second argument on the effect of an abandonment of the ship on the accruing freight. If the question which arises upon this case be stripped of extraneous circumstances, it appears to resolve itself into this single point, Whether the freight have been in this case lost or not? If the fact be merely looked at, freight in the events which have happened has not been lost, but has been fully and entirely earned and received by, *or on behalf of the plaintiffs*, the assured: and if so, no loss can be properly demandable from the underwriters on freight, who merely insure against the loss of that particular subject by the assured. But if it have, or can be, in any other manner or sense, lost to the owners of the ship, it has become so lost to them, not by means of the perils insured against, but by means of an *abandonment of the ship, which abandonment was the act of the assured themselves*, and with which, therefore, and the consequences thereof, the underwriters on freight have no concern. It appears to us, therefore, that *quidcunque viâ datâ*, that is, whether there has been no loss at all of freight, or being such, it has been a loss only occasioned by the act of the assured themselves, that they are not entitled to recover. There must, therefore, be a judgment of nonsuit”.

It is very clear, I conceive, from this judgment, what was the leaning of the learned judges of the Court of King's Bench upon the great question. This is more apparent from what passed in a subsequent case, when Lord *Ellenborough*, in the course of the argument at the bar, said, that he felt great difficulty in saying that

Sharp v. Gladstones,
7 East's R.
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C H A P. IX. that after an abandonment of a ship by the owner to the underwriters *on ship*, he could abandon *the freight which seemed to follow the property in the ship*, being the earnings made by the subsequent use of that, which was then become the property of others, to another set of underwriters: and if he could not, then it might be considered, that having nothing of his own to abandon to the underwriters on freight, it was the same as if there had been no abandonment, in which case the plaintiff (who had been one of the underwriters on freight) could not recover the freight from the owner. To this opinion Mr. Justice *Lawrence* seemed to incline, and probably, if the circumstances of that case would have admitted it, we should have arrived at a clear and explicit judgment on this very important point between the two different sets of underwriters; or in other words, whether the owner of the ship can effectually abandon to the underwriters *on freight*, the freight which the ship may earn after the abandonment of the ship has been made also to the underwriters upon it. But Mr. Justice *Le Blanc* observed, and this was agreed to by the counsel on both sides, that the only question raised for the consideration of the Court, by the case reserved, was, whether the defendant (the owner) were entitled to make any, and what deductions out of the freight, it being assumed, that he was liable, in the first instance, to pay the freight over to the plaintiff. It became the more necessary to settle this point of the deductions which might lawfully be made from the freight, because neither of the former cases of *Thompson v. Rowcroft*, (*ante*, p. 228.) nor *Leatham v. Terry*, (*ante*, p. 231.) had given any clear opinion upon it. Lord *Ellenborough*, upon a suggestion made by the defendant's counsel at the close of the decision of the former case of *Thompson v. Rowcroft*, rather inclining to think that the wages, provisions, &c. were to fall on the owner of the ship, or the underwriters *on ship*: in the latter case the Court are made to say, that the underwriters *on freight* were to contribute proportionally to the expence of bringing the cargo home.

4 East, 52.

9 Bof. &
Poll. 485.

In the case of *Sharp v. Gladstones*, the owner claimed to have paid the following charges upon the ship and freight, a proportion of which he desired to deduct from the net proceeds of the freight received by him:

Expences

OF ABANDONMENT.

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Expences of the ship and crew at <i>Petersburgh</i> and <i>Elfsneur</i> , including port charges and the expences of shipping the cargo on which the freight has been paid	-	-	£305	14	0
Insurance on the same	-	-	9	19	6
Wages of, and provisions for the master, mate, and seamen, from the time they were liberated in <i>Russia</i> till discharged in <i>England</i> , being four months	-	-	223	6	11
Charges paid at <i>Liverpool</i> on ship and cargo	-	-	91	16	5
Insurance on ship home 3000 <i>l.</i> at 4 guineas, less returns	-	-	90	2	0
Wages to the master and crew during their detention in <i>Russia</i> , being six months	-	-	27	0	0
Diminution in the value of the ship and tackle, by wear and tear, on the voyage home, she being then employed for the benefit of those interested in the freight	-	-	300	0	0

Lord *Ellenborough*, after premising that no question arose here between the two sets of underwriters, said, that the underwriters on freight, to whom it has been abandoned, having paid as for a total loss, are entitled to the benefit of salvage, and *the net salvage is that which remains of the subject matter, after payment of the expences of saving it.* After the abandonment, the assured was to be considered as the agent of both sets of underwriters, and he laid out what was necessary for the benefit of the whole concern, without applying the several proportions to each, at the time, for their separate interests. But each set of underwriters is entitled to have their respective salvage subject to the deductions applicable to each. With respect, then, to the particular items, the charges paid at *Liverpool* are to be struck out; and so is the insurance on the ship, which can be no charge on the freight; and so must the last item of diminution of the value of the body of the ship and tackle by wear and tear. The remaining items must be considered as so many deductions from the salvage, which must be apportioned according to the respective interests of the two sets of underwriters in the judgment of the arbitrators to whom it is agreed to refer the amount. The expence of putting the cargo on board was certainly altogether for the benefit of the underwriters on freight; and the expences at *Petersburgh*

C H A P. *Peterburgh* and *Elfineur* must be apportioned. Then his Lordship said, "as to the general question, whether an abandonment could be made to the underwriters on freight, after an abandonment to the underwriters on ship, I beg to be understood as giving no opinion: and with respect to that, this not being the case of a *chartered* but of a *seeking* or *general* ship, a distinction may arise."

Ker v.
Osborne,
9 East, 378.

The question has once more occurred upon similar facts to those already stated; and the parties agreed to take no advantage of form on either side, but to rest on the merits. But the Court said, this agreement of the parties could not alter the case, nor bind the Court to give judgment on the merits, when there appeared to be a clear objection to the action itself. The objection to the decision of this case upon the merits was, that the money had been paid over to a trustee, to hold for the party entitled; and the action for *money had and received* was brought, not against the trustee or stakeholder, but against the original party.

Thus, as far as the decisions have actually gone, the question may still, and, indeed, these last decisions require that it should, be considered as open, although, as far as opinions may be collected from observations thrown out in the course of arguments, the inclination of the Court seems to be in favour of the underwriters *on ship*.

Ch. 4. P. 92. From what was said in a former chapter, and from the cases recited, it will appear, that in wager policies, it was usual to set up a total loss between third persons, for the purpose of their wager, though in fact the ship was safe, and restored to the owner. But in some of these cases the loss was held not to be total; and as in most of them general verdicts were given, and no report of the judge's direction is to be found, it is now impossible to determine upon what grounds the decisions turned. As has been truly said, however, these questions never can arise again, because they originated from wager policies, which are now prohibited by law. But as the case of *Pole v. Fitzgerald* was one of those, in which the majority of the Judges, and the House of Lords held, that though the ship might be deemed lost for

for a time ; yet as she was afterwards recovered, the event of a total loss had not finally happened, according to the construction of the wager ; and as it has frequently occurred in the course of our enquiries, it may be proper to give a short account of it in this place (a).

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It was an action on a policy of insurance on the ship *Goodfellow* privateer, at and from *Jamaica*, to any ports and places where and whatsoever, at sea or shore, a cruising from place to place, for and during the term and space of four calendar months ; the ship was valued at 1000*l.* without further account, and free from average. The defendant in 1744 had subscribed 100*l.* and the plaintiff declared for a total loss of the voyage by a mutiny of the men.

Fitzgerald
v. Pole,
5 Brown's
Parl. Cases,
131. Ambl.
214. S. C.

The cause came on to be tried at *Guildhall* before the Lord Chief Justice *Lee*, when a special verdict was found, stating, That the defendant had subscribed the policy stated in the declaration : that the *Goodfellow* was an *English* privateer, duly commissioned ; was safe at *Jamaica* on the 14th of *June* 1744, and sailed from thence the same day : that on the 10th of *July* 1744, she took a *French* prize of the value of 4,200*l.* sterling : that afterwards the said ship was sailing on her cruise, for a port or place called the *River of Dogs*, to fetch water ; and while she was so sailing towards the *River of Dogs*, and within the four months mentioned in the policy, the crew mutinied against the captain and his officers ; and by force carried the said ship against the will of the captain and officers, who could not resist, to *Jamaica* : and before her arrival there, causelessly, against the consent of the said captain, seized the boat, fire-arms, and cutlasses, carried off the same, and deserted the privateer, by which the voyage and cruise were totally prevented and lost for the remainder of the four months : that the ship arrived at *Jamaica*, and was there in good safety at and after the end of the four months ; but was prevented by the mutiny and desertion, from further pursuing her cruise : that the person insured had interest in the ship to the amount of the sum insured.

(a) A very full and accurate report of the judgment given in the Exchequer-chamber by Lord Chief Justice *Willer* may be seen in *Mr. Durnford's* admirable edition of that learned judge's own MS. Notes, 641.

This

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Vide *supra*,
c. 4. p. 97.
2 Burr.
1100.

See the In-
troduction
sub *fine*.

Ord. of Law.
24. tit. In-
surance,
art. 48.

Art. 49.
2 May. 416.

This case was argued in the King's Bench, and judgment was given for the plaintiff. Upon a writ of error, the Court of Exchequer Chamber unanimously reversed that judgment. The House of Lords afterwards confirmed the judgment of reversal, being of opinion, with the majority of the judges, that the insurer, being, by the terms of the policy, free from all average, the plaintiff could not be entitled to recover but in case of a total loss; and the ship being found, by the special verdict, to be in good safety, at her proper port, at and after the end of the four months, for which the insurance was made, there could be no loss. The counsel for the plaintiff cited many cases, in which the plaintiffs had judgment for a total loss, although the ships remained in being; most of which have already been referred to in the chapter upon capture. But those cases were absolutely denied by the other side; or, if admitted at all, it was insisted, that they made for the defendant. This circumstance, among many others, stated in the introduction of this work, serves to evince the great superiority which the modern practice of our courts, in matters of insurance, has over the ancient.

In many of the maritime countries on the continent of *Europe*, the time, within which the abandonment must be made, is fixed by positive regulation. Thus in *France*, it is ordained, that all cessions or abandonments, as well as demands in virtue of the policy, shall be made as follows: In six weeks, for losses happening on the coasts of the country, where the insurance was made: in three months, in other provinces of our kingdom: in four months, on the coast of *Holland*, *Flanders*, and *England*: in a year, in *Spain*, *Italy*, *Portugal*, *Barbary*, *Muscovy*, *Norway*: and in two years, for the coast of *America*, the *Brazils*, *Guinea*, and other distant countries. When these terms are elapsed, the demands of the assured shall not afterwards be admitted. In cases of detention, the same ordinance provides, that the abandonment shall not be made before six months, if it happen in *Europe* or *Barbary*. If in a more distant country, in a year; both to commence from the day of the notifying this detention to the insurers. A similar regulation to that last mentioned is to be found in the ordinances of *Bilboa*.

In the law of *England* till lately we had no limitation of time, with respect to abandonment, at least that I was able to find : and I believe that none such existed. But from what has been said in the preceding part of this chapter, it would appear, that the insured has a right to call upon the underwriter for a total loss, and of course to abandon, as soon as he hears of such a calamity having happened, his claim to an indemnity not being at all suspended by the chance of a future recovery of part of the property lost : because, by the abandonment, that chance devolves upon the underwriter, by which means the intention of the contracting parties is fully answered, and complete justice is done.

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In a modern decision it has been held by the Court of King's Bench, that as soon as the insured receive accounts of such a loss as entitles them to abandon, they must, in the first instance, make their election whether they will abandon or not : and if they abandon, they must give the underwriters notice in a reasonable time, otherwise they waive their right to abandon, and can never afterwards recover for a total loss. This determination was certainly equitable and just ; for otherwise it was impossible to say, at what time the responsibility of the underwriter was to end, they would be liable to be called upon to contribute at any indefinite period, and a great deal of uncertainty would be introduced into this system of law.

Mitchell v.
Edie, 1 Term
Rep. 608.

In a still more recent case, the doctrine laid down by the Court in *Mitchell v. Edie*, as to the obligation upon the assured to make his election, whether he will abandon or not, was adopted and confirmed.

Case on a policy of assurance on linen on board the *Amphitrite*, at and from *London* to *Jamaica*.

Allwood v.
Henckell,
Guildhall,
Sittings in
B. R. after
Mich. 1795.

The *Amphitrite* was taken by a *French* privateer within a few leagues of *Jamaica*. Part of the property insured was plundered and taken out of the ship. The captain, boatswain, and all but seven men, were taken out of her : a fortnight after she was captured, as the captors were making their way to *America* ; the ship with the remainder of her cargo was retaken by an *English* frigate, and taken under a prize master to *Antigua*. The ship
and

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and cargo were both sold under a decree of the Vice Admiralty Court of *Antigua*, by a prize agent, who received the proceeds, and was to pay them over to the concerned, upon payment of one-eighth salvage pursuant to the last prize act.

The capture and recapture were entered at *Lloyd's*, on the 15th of *February* 1795 ; but it was not known where the ship was carried till the 30th of *March*, when a letter was received at *Lloyd's*, addressed to the owners and freighters and underwriters on ship *Amphitrite* and cargo, from the judge of the Vice Admiralty Court of *Antigua*, informing them of the arrival and sale of ship and cargo under a decree of the Court, and desiring to have some agent appointed to remit the proceeds to *England*. Powers of attorney were sent out in *April* by the assured for this purpose ; and the proceeds were desired to be remitted to the banking-house of *Smith, Payne, and Smith*, one of which gentlemen was agent to the assured. The defendant was acquainted in *April* of the loss, but no abandonment was proved to have been made till *August*, near four months after Mr. *Payne*, who was the plaintiff's agent, had sent out the power of attorney. On the part of the plaintiff, it was contended that, admitting there was no abandonment, in this case the property having been absolutely sold and converted into money, before the parties knew where the ship was taken to, the loss was absolutely total in its nature ; and therefore there was no occasion for an abandonment.

Lord *Kenyon*, though he did not give any decided opinion upon this point, inclined to think, " that an abandonment was necessary ; and that the case was the same as if the property had remained in *specie* at *Antigua*, and had not been sold (a). That the assured is not bound to abandon in any case ; and might, in case the sales had been very advantageous, have taken the benefit of them in the same manner as they might have retained this property, if it had remained in *specie*. But the assured must make his election speedily, whether he will abandon or not, and put the underwriter into a situation to do all that is necessary for the preservation of the property, whether sold or unsold. He cannot lie by and

see also
Anderson v.
The Royal
Exch. Assur.
Company,
7 East, 38,
and Barker
v. Plakes,
9 East, 283.
Arc. ante,
p. 223.

(a) In the case of *Hodgson and another v. Blackiston*, Sittings after Hilary Term, 38 Geo. III. in the King's Bench, it was held, that a notice of abandonment was necessary, though the ship and cargo had been sold and converted into money when the notice of the loss was received.

treat the loss as an average loss, and take measures for the recovery of it, without communicating that fact to the underwriters, and letting them know that the property is abandoned to them."

Verdict for plaintiff, subject to an account as for an average loss.

But if the insured, hearing that his ship is much disabled and has put into port to repair, expresses his desire to the underwriters to abandon, and be dissuaded from it by them, and they order the repairs to be made; they are liable to the owner for all the subsequent damage occasioned by that refusal, though it should amount to the whole sum insured. Because the reason why notice of abandonment is deemed necessary, is to prevent surprize or fraud upon the underwriter: but in the case put, they have, by their own act, superseded the necessity of notice.

We have thus taken a view, in this and the eight preceding chapters, of the nature of that instrument by which the contract of insurance is effected; and of the different modes, by which it may be construed: we have treated of the various losses, to which the underwriter subjects himself by that contract; we have shewn, when the losses are to be considered as partial, when as total; and in what cases, and under what circumstances, the insured shall be allowed to abandon to the underwriter. The course of our inquiry now naturally leads us to observe, in what instances the insurer is discharged from any responsibility; either on account of the contract being void, from its commencement, by reason of some radical defect; or because the insured has failed to perform some of those conditions, necessary to be fulfilled on his part, before he can call upon the insurer for an indemnity.

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See also
Farmeter
v. Tod-
hunter.
Sittings af-
ter Mich.
1808.

Da Costa v.
Newham
a Term Rep.
407.

CHAPTER THE TENTH.

Of Fraud in Policies.

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IN treating of those causes, which make policies void from the beginning, or in other words, which absolutely annul the contract, it will be proper in the first place to consider, how far it will be affected by any degree of fraud. In every contract between man and man, openness and sincerity are indispensably necessary to give it its due operation ; because, fraud and cunning once introduced, suspicion soon follows, and all confidence and good faith are at an end. No contract can be good, unless it be equal ; that is, neither side must have an advantage by any means, of which the other is not aware. This being admitted of contracts in general, it holds with double force in those of insurance ; because the underwriter computes his risk entirely from the account given by the person insured, and therefore it is absolutely necessary to the justice and validity of the contract, that this account be exact and complete. Accordingly the learned judges of our courts of law, feeling that the very essence of insurance consists in a rigid attention to the purest good faith, and the strictest integrity, have constantly held that it is vacated and annulled by any the least shadow of fraud or undue concealment.

1 Blac.Com.
460. Grot.
de jure belli,
lib. 2. c. 12.
f. 23. Puf-
fendorff de
jure nat. l. 5.
c. 9. f. 8.
Bynker-
hoek. quest.
jur. p. iv.
l. 4. c. 26.
Ord. de Lew.
24. f. 38.
1 Black.
594. 3 Burr.
2509.

After what has been said, it will hardly be necessary to mention, that both parties, the insurer and insured, are equally bound to disclose circumstances that are within their knowledge ; and therefore if the insurer, at the time he underwrites, can be proved to have known that the ship was safe arrived, the contract will be equally void, as if the insured had concealed from him some accident, which had befallen the ship.

In perusing the numerous cases and decisions, which, I am sorry to say, are to be found in our books under this head, it occurred to me, that they were liable to a threefold division : 1st, The allegation of any circumstances, as facts, to the under-
writer,

writer, which the person insured knows to be false: 2dly, The suppression of any circumstances, which the insured knows to exist; and which, if known to the underwriter, might prevent him from undertaking the risk at all, or if he did, might entitle him to demand a larger premium: and, lastly, a misrepresentation. The last of these, a *misrepresentation*, seems to fall under the first head, the *allegatio falsi*; and so in some measure it does; because wherever a person knowingly and wilfully misrepresents any thing, he asserts a falsehood. But it was thought necessary to make a division for itself; because if a *material* fact be misrepresented, though by mistake, the contract is void, as much as if there had been actual fraud: for the underwriter has computed his risk upon information, which was false. Of each of these in order. Dougl. 247:

Nothing can be so clear a proof of fraud, as the assertion of the truth of some circumstance, which the person asserting it must know to be false. In our reporters, we do not meet with so many cases under this division of the subject, as under the two following: and indeed, from the nature of the thing, it is impossible we should; because in such a case, the only question is, did the insured assert this to be the truth. If he did, the inquiry is at an end; because we are now presuming it to be the assertion of a circumstance within his own knowledge. This being a mere question of fact, is not a subject for a reporter. But in the other cases, there is greater room for investigation; we may properly inquire, for instance, whether the insured was bound to disclose this fact; whether the misrepresentation was in a material part; and many other similar questions of which we shall see the necessity hereafter.

The few following cases will evidently shew, that our idea was right, when we supposed, that under the head of the *allegatio falsi*, the only inquiry would be, whether the person insured, knowing the contrary, asserted a particular thing to be true.

In a case before Lord Chief Justice *Holt*, in the reign of *William* and *Mary*, that learned judge held, that if the goods were insured as the goods of an *Hamburgher*, who was an ally, and the goods were, in fact, the goods of a *Frenchman*, who

Skinner,
327.

C H A P. was an enemy ; it was a fraud, and that the insurance was not
 X. good.

R. berts v.
 Fonnetau,
 Sitting at
 Guildhall
 after Trin.
 1742.

In another case, a letter being received, stating, that a ship failed from *Jamaica* for *London*, on the 24th of *November*, after which an insurance was made, and the agent told the insurer, that the ship failed the latter end of *December* ; this was also held by Lord Chief Justice *Lee* to be a fraud, and the defendant had a verdict upon this point, there being another in the cause not material to be mentioned here.

MSS. penes
 Ric.

Woolmer v.
 Muilman,
 3 Burr.
 1419.
 3 Black.
 427.

Upon a special case reserved for the opinion of the Court, the following circumstances appeared :

It was an action on the case, brought for the recovery of a total loss, on a policy of insurance made on goods and merchandizes on board the ship *Bona Fortuna*, at and from *North Bergen* to any ports or places whatsoever, until her safe arrival in *London*. It was underwritten thus : " Warranted neutral ship and property." The defendant underwrote the policy for 150*l*. The defendant pleaded the general issue, and paid into court the premium received by him for the said insurance. This cause came on to be tried at *Guildhall* before Lord *Mansfield* ; when it was admitted, that the plaintiff had interest on board the ship to a large value, to the amount of the sum insured. The ship with the goods and merchandizes so laden, and being on board her, after her departure from *North Bergen*, and before her arrival in *London*, proceeding on her voyage was, by the force of winds and stormy weather, wrecked, cast away, and sunk in the seas ; and the said goods and merchandizes were thereby wholly lost. It was expressly stated, " that the ship or vessel, called the *Bona Fortuna*, and the property on board, at and before the time she was lost, were not neutral-property, as warranted by the " said policy."

Lord *Mansfield*, and the rest of the Court, were of opinion, that it was too clear a case to bear an argument. This was *no contract* ; for there was a falsehood, in respect of the condition of the thing insured : because the plaintiff insured neutral property, and this was not neutral property.

From

From the preceding case, we may collect this principle, that a false assertion in a policy will vitiate the contract; even though the loss happen in a mode not affected by that falsity.

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Another observation is suggested by the perusal of the case of *Woolmer* and *Muilman*. It arose upon a warranty; and the learned judges declared, that the warranty being false, there was no contract. Now, as we shall see, when we come to the chapter on warranties, the general rule with respect to them is this, that the non-compliance with them does not vacate the contract from the beginning; but it amounts to much the same thing, namely, that the insured, not having complied with those conditions, which he has taken upon himself to perform, cannot recover against the underwriter.

But the following answer is submitted, which, if allowed, will reconcile any seeming difference, that arises in the cases upon the subject. Wherever a man warrants a thing to be true, which, at the time he does so, he must unavoidably know to be false, it comes under the *allegatio falsi*, and the contract is void, as in the case just reported. But if he warrant or undertake that a certain thing shall be done, for instance, that the ship shall sail with convoy, or on a particular day; these being circumstances materially varying the risk, the underwriter shall not be responsible for a loss, if they are not complied with: but the contract is not void from the beginning, nor does the insured incur any moral guilt; because they do not depend entirely for their performance upon the will of the person insured, nor could they be within his knowledge, at the time he entered into the contract.

A short time after the case of *Woolmer* against *Muilman* had been decided, another very similar case came on at *Guildhall* before Lord *Mansfield*.

It was an action on a policy of insurance on goods laden on board such a ship, warranted a *Portuguese*. The insurance was made during the *French* war, when the premium would have been much higher on an *English* ship. The plaintiff gave partial evidence of her being a *Portuguese*; and that she was obliged,

Fernandes
De Costa,
Sitt. Jurer
Hil. 4 Geo.
III.

C H A P.

X.

on account of perils of the sea, to put into a *French* port, by which the cargo was spoiled. This was admitted by the defendant, who contended that during her stay at the *French* port, she was libelled, and condemned as not being *Portuguese*: and that although the goods were lost by a different peril, yet in fact the ship was not *Portuguese*, (being insured as such,) and that this vitiated the policy *ab initio*—and this was agreed to be law. In order to prove that she was not *Portuguese*, the defendant produced the sentence of condemnation, and the confirmation thereof in the courts of *France*; and an answer of the present plaintiff in the court of Chancery here, by which it was admitted, that the ship was condemned as not being, or under pretence of not being, *Portuguese*.

Lord Mansfield.—“As the sentence is always general (without expressing the reason of the condemnation) attested copies of the libel ought in strictness to have been produced, to shew upon what ground the ship was libelled against. But as the plaintiff has by his answer in Chancery admitted that she was condemned, as not being *Portuguese*: when added to the expression used in the sentence of confirmation, *that the ship was condemned in the court of prizes*, there is sufficient evidence for us to proceed upon.” The defendant, the underwriter, had a verdict.

1 Black.
Rep. 465.

2 Black.
Rep. 594.

The second species of fraud, which affects insurances, is the concealment of circumstances, known only to one of the parties entering into the contract. Upon this head, the principles of law are perfectly clear, free from doubt or possibility of error. Concealment of circumstances vitiates all contracts, upon the principles of natural law. Insurance is a contract of speculation. The facts, upon which the risk is to be computed, lie, for the most part, within the knowledge of the insured only. The underwriter must therefore rely upon him for all necessary information; and must trust to him, that he will conceal nothing, so as to make him form a wrong estimate. If a mistake happen, without any fraudulent intention, still the contract is annulled, because the risk is not the same which the underwriter intended. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his belief of the contrary.

These

These principles have been uniformly supported by a variety of decisions. C H A P. X.

One having a doubtful account of his ship, that was at sea, namely, that a ship, described like his, was taken, insured her, without giving any notice to the insurers of what he had heard either as to the hazard, or the circumstances, which might induce him to believe that his ship was in great danger, if not actually lost. The insurers bring a bill for an injunction, and to be relieved against the insurance as fraudulent.

Da Costa v. Scandret, in *Chancery*, 2 P. Wms. 170.

Lord Chancellor *Macclesfield*.—"The insured has not dealt fairly with the insurers in this case; he ought to have disclosed to them what intelligence he had of the ship's being in danger, and which might induce him, at least, to fear that it was lost, though he had no certain account of it. For if this circumstance had been discovered, it is impossible to think, that the insurers would have insured the ship at so small a premium as they have done; but either would not have insured at all, or would have insisted on a larger premium, so that the concealment of this intelligence is a fraud." Whereupon the policy was decreed to be delivered up with costs, but the premium to be paid back, and allowed out of the costs.

In another case it appeared, that on the 25th of *August* 1740, the defendant underwrote a policy from *Carolina* to *Holland*. It came out in evidence, that the agent for the plaintiff had, on the 23d of *August* (two days before the policy was effected), received a letter from *Cowes*, dated the 21st of *August*, wherein it is said: "On the 12th of this month, I was in company with the ship *Davy* (the ship in question); at twelve at night lost sight of her all at once; the captain spoke to me the day before that he was leaky, and the next day we had a hard gale." The ship, however, continued her voyage till the 19th of *August*, when she was taken by the *Spaniards*; and there was no pretence of any knowledge of the actual loss at the time of the insurance, but it was made in consequence of a letter received that day from the plaintiff abroad, dated the 27th *June* before.

Seaman v. Fonnercau, 2 Stra. 1181, and *MSS. penes me*.
Webster v. Forster, 1 Eip. R. 407.
Willis v. Glover, 1 New Rep 14. Similar doctrine.

Lord Chief Justice *Lee* declared, "that as these are contracts upon chance, each party ought to know all the circumstances,

C H A P. X. And he thought it not material, that the loss was not such an one as the letter imported; for those things are to be considered in the situation of them at the time of the contract, and not to be judged of by subsequent events. He therefore thought it a strong case for the defendant." The jury found accordingly.

Hodgson v.
Richardson,
J. Black.
R. p. 463.

In an action on a policy of insurance, the case was, that the ship was insured *at and from Genoa*, liable to average; her loading consisting of pot-ash, verdigrease, cotton, and other perishable commodities. This loading was put on board at *Leghorn* the 10th of *August*, and the vessel had lain at *Genoa* above five months, being originally bound for *Dublin*; but losing her convoy, she put into *Genoa* the 13th of *August*, and lay there till the 5th of *January*, when she sailed. And the insurance was made the 20th of *January*; at which time these circumstances were known to the assured, but not communicated to the underwriter. A few days after she put to sea, she was shattered by a storm, and the cargo considerably damaged. The jury found a verdict for the plaintiff; and a new trial was moved for on this ground, that the policy was bad *ab initio*, for want of a due disclosure of the circumstances.

Lord Mansfield.—“The question is, whether here was a sufficient disclosure; that is, whether the fact concealed was material to the risk run. This is a matter of fact, and if material, the consequence is matter of law, that the policy is bad. Now who can say, that no risk was run, during the five months’ stay at *Genoa*, or no damage happened in that period? The policy is founded on misrepresentation: the ship is insured “at and from *Genoa to Dublin*; the adventure to begin from the loading, to “equip for this voyage.” This plainly implies, that *Genoa* was the port of loading: and at the trial, all the witnesses said, that by usage, it was material to acquaint the underwriter, whether the insurance was to be at the commencement or in the middle of a voyage.

Mr. Justice Wilmot.—“The fact disclosed by this policy is not true, that *Genoa* is the loading port; for so it must be understood. In such cases I shall not speculate upon the materiality or immateriality of the fact. Not but that I think the length of
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the stay at *Genoa* is very material, in case of such perishable commodities." CHAP.
X.

Mr. Justice *Tates*.—"The concealment of material circumstances vitiates all contracts, upon the principles of natural law. A man, if kept ignorant of any material ingredient, may safely say, it is not his contract. And I think this fact material, for the reasons before given." A new trial was accordingly granted.

The doctrine, so accurately laid down in the preceding cases, has since been the principle on which several verdicts have been given, in cases of this nature; a few of which it will be proper to mention.

An action was brought on a policy of insurance on goods on board the *Matty and Betty*, at and from the coast of *Africa*, to her last discharging port in the *British West Indies*. The objection made to paying the loss was, that there had been a material concealment or misrepresentation of the true state or situation of the ship and voyage at the time of underwriting the policy. The ship had been sent out to trade on the coast of *Africa*, with directions to proceed from thence to the *British West Indies*, and to stop at *Barbadoes*, if she could get a sale; if not, to proceed to *Montego-Bay*. On the 2d of *October* she sailed from *St. Thomas's* on the coast of *Africa*, with a cargo of slaves, and was taken on the 6th of *December* following by an *American* privateer. A letter was received by a house at *Liverpool* on the 21st of *February*, mentioning that the ship was well, and had sailed from *St. Thomas's* on the 2d of *October*. This information was communicated next day to the plaintiffs, who, in consequence of it, wrote the same evening to two different brokers, to get a new insurance on the ship, there having been one before, and another on the cargo, which last was the subject of the present action. In the instructions to the brokers, the plaintiffs say nothing of the ship from the time of her first sailing; but to one of the brokers they wrote thus: "we should be glad if you would get us 600*l.* more on the ship, as she is rather long; and we think it not prudent to run so large a risk at so critical a time. We expect to hear soon of her." It had afterwards occurred that the policy might be affected, if intimation was not given of the

Ratcliffe and another v. Shoolbred, Sittings at Guildhall after Trial. 1780.

C H A P.
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the letter which had been received. The broker, therefore, by direction of the plaintiffs, added to the instructions: "the above ship was on the coast the 2d of *October*;" but said nothing of her having sailed from *St. Thomas*. The policy was dated the 21st of *March*.

Lord *Mansfield*.—"The insured is bound to represent to the underwriter all the material circumstances of the ship and voyage. If he do not, though by accident only, or neglect, the underwriters are not liable: *à fortiori*, if he suppress or misrepresent from fraud. The question is, Whether this be one of those cases which is affected by misrepresentation or concealment? If the plaintiffs concealed any material part of the information they received, it is a fraud; and the insurers are not liable." The jury found for the defendant agreeably to his lordship's direction.

M^cAndrews
v. Bell.
1 Esp. R.
373

So the underwriter had a verdict, where the assured had on the 24th of *November* received a letter from *Lisbon* dated the 8th, stating the ship to be then ready to sail, and did not effect the insurance till the 2d of *December*, and did not then communicate the letter.

Fillis v.
Brutton,
Sittings at
Guildhall
after H
1782.

In another case, the policy was on the brig *Richard*, at and from *Plymouth* to *Bristol*. Several letters passed between the plaintiff and the broker, who effected the policy, as to the premium at which the insurance could be made: at last, it was underwritten at four guineas *per cent*. The broker's instructions stated *the ship ready to sail on the 24th of December*. The broker represented to the underwriter that the ship was in port, when in fact she had sailed the 23d of *December*.

Lord *Mansfield* said, "that this was a material concealment and misrepresentation." The jury, however, hesitated: his lordship then laid down the following as general principles.— "In all insurances, it is essential to the contract, that the assured should represent the true state of the ship to the best of his knowledge. On that information the underwriters engage. If he state that as a fact which he does not know to be true, but only believes it, it is the same as a warranty. He is bound to tell the underwriters truth. In the present insurance, the only

material point is this: had the ship failed, or was she in port?" C H A P.
X.
Upon this the jury found for the defendant.

But although the rule is laid down thus generally, that one of the contracting parties is bound to conceal nothing from the other; yet it is by no means so general, as not to admit of an exception. *Aliud est celare, aliud tacere.* There are many matters as to which the insured may be innocently silent. 1st, As to what the insurer knows, however he came by that knowledge. 2d, As to what he ought to know. 3d. As to what lessens the risk. An underwriter is bound to know political perils, as to the state of war or peace. If he insure a privateer he needs not be told her destination. And, as men reason differently from the same facts, he needs not be told another's conclusions from known facts.

1 Black.
Rep. 593.

These ideas were fully entered into, explained and illustrated in the argument of Lord *Mansfield*, in delivering the opinion of the court in *Carter v. Boehm*.

This was an insurance cause upon a policy, interest or no interest, without benefit of salvage. The insurance was made by the plaintiff, for the benefit of his brother, governor *George Carter*. The jury found a verdict for the plaintiff; upon which a new trial was moved for on the ground that circumstances had not been sufficiently disclosed. Lord *Mansfield* reported the evidence given at the trial; by which it appeared, that it was a policy of insurance for one year, namely, from the 16th of *October* 1759, to the 16th of *October* 1760, for the benefit of the governor of *Fort Marlborough*, *George Carter*, against the loss of *Fort Marlborough*, in the island of *Sumatra*, in the *East Indies*, by its being taken by a foreign enemy. The event happened: the fort was taken by Count *D'Esfaigne*, within the year. The first witness was *Cawthorne* the broker, who produced the memorandum given by the governor's brother (the plaintiff) to him; and the use made of these instructions was to shew, that the insurance was made for the benefit of governor *Carter*, and to insure him against the taking of the fort by a foreign enemy. Both parties had been long in Chancery; and the depositions, there made on both sides, were read as evidence upon this trial. It was objected on behalf of the defendant, to be a fraud, by conceal-

Carter v.
Boehm,
3 Burr.
1905. and
1 Black.
Rep. 593.
Vide ante,
c. 1. p. 15.

C H A P. X. concealment of circumstances which ought to have been disclosed; and particularly the weakness of the fort, and the probability of its being attacked by the *French*; which concealment was offered to be proved by two letters. The first was a letter from the governor to his brother *Roger Carter*, his trustee, and the plaintiff in this cause: the second was from the governor to the *East India Company*.

The evidence in reply to this objection, consisted of three depositions in Chancery; setting forth, that the governor had 20,000*l.* in effects; and had only insured 10,000*l.*: and that he was guilty of no fault in defending the fort. The first of these depositions was captain *Tryon's*, which proved, that this was not a fort proper or designed to resist *European* enemies; but only calculated for defence against the natives of the island of *Sumatra*; that the governor's office is not military, but only mercantile: and that *Fort Marlborough* is only a subordinate factory to *Fort St. George*. There was no evidence to the contrary; and a special jury found a verdict for the plaintiff.

After argument at the bar, upon the motion for a new trial, and time taken by the court to deliberate, their unanimous opinion was delivered by

Lord *Mansfield*.--“This is a motion for a new trial. In support of it the counsel for the defendant contend, that some circumstances in the knowledge of governor *Carter*, not having been mentioned at the time the policy was underwritten, amount to a concealment, which ought, in law, to avoid the policy. The counsel for the plaintiff insist, that the not mentioning these particulars does not amount to a concealment, which ought, in law, to avoid the policy; either as a fraud, or as varying the contract. 1st, It may be proper to say something in general of concealments which avoid a policy. 2dly, To state particularly the case now under consideration. 3dly, To examine whether the verdict which finds this policy good, although the particulars objected were not mentioned, is well founded.

First, Insurance is a contract upon speculation. The special facts, upon which the risk is to be computed, lie most commonly in the knowledge of the insured only. The underwriter trusts

to his statement, and proceeds upon confidence, that he does not keep back any circumstances within his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk, as if it did not exist. The keeping back such circumstances is a fraud; and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the underwriter is deceived, and the policy is void: because the risk run is really different from the risk understood, and intended to be run at the time of the agreement. The policy would equally be void against the underwriter, if he concealed any thing; as if he insured a ship on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium. The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent as to grounds open to both, to exercise their judgments upon. *Aliud est celare; aliud tacere: neque enim id est celare quicquid reticeas; sed cum quod tu scias, id ignorare, emolumentum tui causâ, velis eos, quorum interfit id scire.* This definition of concealment, restrained to the efficient motives, and precise subject of any contract, will generally hold to make it void, in favour of the party misled by his ignorance of the thing concealed. There are many matters, as to which the insured may be innocently silent; he needs not mention what the underwriter knows, *scientia utrinque par pares contrabentes facit.* An underwriter cannot insist that the policy is void, because the insured did not tell him what he actually knew, what way soever he came to the knowledge. The insured needs not mention what the underwriter ought to know; what he takes upon himself the knowledge of; or what he waives being informed of. The underwriter needs not be told what lessens the risk agreed, and understood to be run by the express terms of the policy. He needs not be told general topics of speculation: as for instance, the underwriter is bound to know every cause, which may occasion natural perils; as the difficulty of the voyage; the kind of seasons; the probability of lightning; hurricanes, and earthquakes. He is bound to know every cause which may occasion political perils; from the rupture of states; from war, and the various operations of war. He is bound to know the probability

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Officiis, lib.
3. c. 12, 13.

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of safety, from the continuance and return of peace ; from the imbecility of the enemy, through the weakness of their councils, or their want of strength. If an underwriter insure private ships of war, by sea, and on shore from ports to ports, and from places to places, any where, he needs not be told the secret enterprises upon which they are destined: because he knows some expedition must be in view: and from the nature of his contract, he waives the information, without being told. If he insure for three years he needs not be told any circumstance to shew it may be over in two: or, if he insure a voyage with liberty of deviation, he needs not be told what tends to shew there will be no deviation. Men argue differently, from natural phenomena, and political appearances: they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging, are open to both: each professes to act from his own skill and sagacity; and therefore, neither needs to communicate to the other. The reason of the rule, which obliges the parties to disclose, is to prevent fraud, and encourage good faith, it is adapted to such facts as vary the nature of the contract, which one privately knows, and the other is ignorant of, and has no reason to suspect. The question, therefore, must always be, "Whether there was, under all the circumstances, at the time the policy was underwritten, a fair statement, or a concealment: fraudulent, if designed; or, though not designed, varying materially the object of the policy, and changing the risk understood to be run (a)."

"2dly. This brings me, in the second place, to state the case now under consideration. The policy is against the loss of *Fort Marlborough*, from being destroyed by, taken by, or surrendered unto, any *European* enemy, between the 16th *October* 1759, and the 16th of *October* 1760. The underwriter knew at the time, that the policy was to indemnify, to that amount, *George*

(a) Within this principle Lord Ellenborough was of opinion, that it was not necessary, where an insurance was made on the homeward voyage, to communicate a letter from the captain, stating the damages he had encountered on the outward voyage, and describing the ship as being then unseaworthy, and standing in need of a great many repairs, as governing the time when the ship would be able to sail; for if this were so, said his Lordship, it would be necessary in all cases to inform the underwriters when any repairs were wanting. *Beckwith v. Sydebotham*, 1 *Campbell, N. P. cases*, p. 116. And see also post. c. 12. the cases of *Shoolbred v. Nutt*, and of *Hayward v. Rogers*.

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Carter, the governor of *Fort Marlborough*, in case the event insured against should happen. The governor's instructions for the insurance, bearing date at *Fort Marlborough*, the 22d of September 1759, were laid before the underwriter. Two actions upon this policy were tried before me in the year 1762. The defendants then knew of a letter written to the *East India Company*, which the Company offered to put into my hands; but would not deliver it to the parties, because it contained some matters, which they did not think proper to be made public. An objection occurred to me at the trial, whether a policy against the loss of *Fort Marlborough*, for the benefit of the governor, was good; upon the principle, which does not allow a sailor to insure his wages. But considering that this place, though called a fort, was really but a factory, or settlement for trade: and that he, though called a governor, was really but a merchant: considering too, that the law allows a captain of a ship to insure goods, which he has on board, or his share in the ship, if he be a part owner, and the captain of a privateer, if he be a part owner, to insure his share: considering also, that the objection could not, upon any ground of justice, be made by the underwriter who knew him to be governor, at the time he took the premium, and as with regard to principles of public convenience, the case so seldom happens, (I never saw one before,) any danger from the example is little to be apprehended: I did not think myself warranted, upon that point, to nonsuit the plaintiff; especially as the objection did not come from the bar. Though this point was mentioned at the last trial, it was not insisted upon; nor has it been seriously argued, upon this motion, as sufficient alone to vacate the policy: and if it had, we are all of opinion, that we are not warranted to say, that it is void, upon this account. Upon the plaintiff's obtaining the two former verdicts, the underwriters went into a court of Equity; where they have had an opportunity to sift every thing to the bottom, to get every discovery from the governor and his brother, and to examine any witnesses that were upon the spot. At last, after the fullest investigation of every kind, the present action came on to be tried at the sittings after last term. The plaintiff proved without contradiction, that the place called *Bencoolen* or *Fort Marlborough*, is a factory or settlement, but no military fort or fortress: that it was not established for a place of arms or defence against the attacks of an *European* enemy; but merely for the purpose

Vide ante,
c. 1. p. 15.

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purpose of trade, and of defence against the natives: that the fort was only intended and built to keep off the country blacks: that the only security to *Euroean* ships of war consisted in the difficulty of the entrance and navigation of the river, for want of proper pilots: that the general state and condition of the said fort, and of the strength thereof, were in general well known, by most persons conversant or acquainted with *Indian* affairs, of the state of the Company's factories or settlements; and could not keep secret or concealed from persons, who should endeavour, by proper inquiry, to inform themselves: that there were no apprehensions or intelligence of any attack by the *French*, until they attacked *Nattal* in *February* 1760: that on the 8th of *February* 1760, there was no suspicion of any design by the *French*: that the governor at that time bought of the witness goods to the value of 4000*l.* and had goods to the value of above 20,000*l.*, and then dealt for 50,000*l.* and upwards: that on the 1st of *April* 1760, the fort was attacked by a *French* man of war of 64 guns, and a frigate of 20 guns, under the *Compte D'Esaigne*, brought in by *Dutch* pilots, was unavoidably taken, and afterwards delivered to the *Dutch*, the prisoners being sent to *Batavia*. On the part of the defendant, after all the opportunities of inquiry, no evidence was offered, that the *French* ever had any design upon *Fort Marlborough*, before the end of *March* 1760, or that there was the least intelligence or alarm, that they might make the attempt till the taking of *Nattal*, in the year 1760. They did not offer to disprove the evidence, that the governor had acted, as in full security, long after the month of *September* 1759; and had turned his money into goods, so late as the 8th of *February*, 1760. There was no attempt to shew that he had not lost by the capture very considerably beyond the value of his insurance. But the defendant relied upon a letter, written to the *East India* Company, bearing date the 16th of *September* 1759, which was sent to *England* by the *Pitt*, captain *Wilson*, who arrived in *May* 1760, together with the instructions for insuring, and also a letter bearing date the 22d of *September*, 1759, sent to the plaintiff by the same conveyance, and at the same time (which letters his lordship repeated). They relied too upon the cross examination of the broker who negotiated the policy, that, in his opinion, these letters ought to have been produced, or the contents disclosed; and that, if they had, the policy would not have been underwritten. The defendant's counsel contended

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at the trial, as they have done upon this motion, that the policy was void : 1st, Because the state and condition of the fort, mentioned in the governor's letter to the *East India Company* was not disclosed. 2dly, Because he did not disclose, that the *French*, not being in a condition to relieve their friends upon the coast, were most likely to make an attack upon this settlement, rather than remain idle : 3dly, That he had not disclosed his having received a letter of the 4th of *February* 1759; from which it seemed, that the *French* had a design to take this settlement by surprize, the year before. They also contended, that the opinion of the broker was almost decisive. The whole was laid before the jury, who found for the plaintiff.

“ Thirdly, It remains to consider these objections; and to examine whether this verdict is well founded. To this purpose, it is necessary to consider the nature of the contract, at the time it was made. The policy was signed in *May* 1760. The contingency was, whether *Fort Marlborough* was or would be taken, by an *European* enemy, between *October* 1759 and *October* 1760. The computation of the risk depended upon the chance, whether any *European* power would attack the place by sea. If they did, it was incapable of resistance. The underwriter at *London*, in *May* 1760, could judge much better of the probability of the contingency, than governor *Carter* could at *Fort Marlborough* in *September*, 1759. He knew the success of the operations of the war in *Europe*: he knew what naval force the *English* and *French* had sent to the *East Indies*. He knew from a comparison of that force, whether the sea was open to any such attempt by the *French*. He knew, or might know, every thing which was known at *Fort Marlborough* in *September* 1759, of the general state of affairs in the *East Indies*, or the particular condition of *Fort Marlborough*, by the ship which brought the order for the insurance. He knew that ship must have brought many letters to the *East India Company*; and particularly from the governor. He knew what probability there was of the *Dutch* committing, or having committed, hostilities. Under these circumstances, and with this knowledge, he insures against the general contingency of the place being attacked by an *European* power. If there had been any design on foot, or enterprize begun in *September* 1759, to the knowledge of the governor, it would have varied the risk understood by the underwriter; on account of his

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not being told of a particular design or attack then *subsisting*; and he estimated the risk upon the foot of an uncertain operation, which might or might not be attempted. But the governor had no notice of any design subsisting in *September 1759*. There was no such design in fact: the attempt was made without premeditation, from the sudden opportunity of a favourable occasion, by the connivance and assistance of the *Dutch*, which tempted *Compte D'Esaigne* to break his parole. These being the circumstances, under which the contract was entered into, we shall be better able to judge of the objections upon the foot of concealments. The first concealment is, that he did not disclose the condition of the place. The underwriter knew the insurance was for the governor. He knew the governor must be acquainted with the state of the place. He knew the governor could not disclose it, consistently with his duty. He knew the governor, by insuring, apprehended, at least, the possibility of an attack. With this knowledge, without asking a question, he underwrote. By so doing, he took the knowledge of the state of the place upon himself. It was a matter, as to which he might be informed various ways: it was not a matter within the private knowledge of the governor only. But not to rely upon that, the utmost which can be contended is, that the underwriter trusted to the sort being in the condition in which it ought to be: in like manner, as it is taken for granted, that a ship insured is sea worthy. What is that condition? All the witnesses agree, that it was only to resist the natives, and not an *European* force. The policy insures against a total loss, taking for granted, that if the place was attacked, it would be lost. The contingency, therefore, which the underwriter has insured against is, whether the place would be attacked by an *European* force; and not whether it would be able to resist such an attack, if the ships could get up the river. It was particularly left to the jury to consider whether this was the contingency in the contemplation of the parties: they have found that it was. And we are all of opinion, that in this respect, their conclusion is agreeable to the evidence. The state and condition of the place were material in this view only, in case of a land attack by the natives.

“The second concealment is, his not having disclosed, that, from the *French* not being able to relieve their friends upon the coast, they might make them a visit. This is no part of the fact
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Of the case : it is mere speculation of the governor, from the general state of the war. The conjecture was dictated to him from his fears. It is a bold attempt for the conquered to attack the conqueror in his own dominions. The practicability of it, in this case, depended upon the *English* naval forces, in those seas, of which the underwriter could better judge at *London* in *May* 1760, than the governor could at *Fort Marlborough*, in *September* 1759. The third concealment is, that he did not disclose the letter from Mr. *Winch* of the 4th of *February* 1759, mentioning the design of the *French* the year before. What that letter was ; how he mentioned the design ; or upon what authority he mentioned it ; or by whom the design was supposed to be imagined, does not appear. The defendant has had every opportunity of discovery ; and nothing has come out upon it, as to this letter, which he thinks makes for his purpose. The plaintiff offered to read the account *Winch* wrote to the *East India* Company, which was objected to ; and therefore, it was not read. The nature of that intelligence, therefore, is very doubtful. But taking it in the strongest light, it is a report of a design to surprize the year before ; but then dropt. This is a topic of mere general speculation, which made no part of the fact of the case upon which the insurance was to be made. It was said, if a man insured a ship, knowing that two privateers were lying in her way, without mentioning that circumstance, it would be a fraud. I agree it. But if he knew that two privateers had been there the year before, it would be no fraud, not to mention that circumstance : because it does not follow that they will cruise this year, at the same time, in the same place ; or that they are in a condition to do it. If the circumstance of this design laid aside had been mentioned, it would have tended rather to lessen the risk, than increase it ; for the design of a surprize, which has transpired, and been laid aside, is less likely to be taken up again ; especially by a vanquished enemy. The jury considered the nature of the governor's silence as to these particulars ; they thought it innocent, and that the omission to mention them, did not vary the contract. And we are all of opinion, that, in this respect, they judged extremely right. There is a silence, not objected to at the trial, nor upon this motion ; which might, with as much reason, have been objected to, as the two last omissions, rather more. It appears by the governor's letter to the plaintiff, that he was principally apprehensive of a *Dutch* war. He cer-

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tainly had, what he thought, good grounds for this apprehension. *Compte D'Esaigne* being piloted by the *Dutch*, delivering the fort to the *Dutch*, and sending the prisoners to *Batavia*, is a confirmation of those grounds. Probably the loss of the place was owing to the *Dutch*. The *French* could not have got up the river without *Dutch* pilots; and it is plain the whole was concerted with them. And yet, at the time of underwriting the policy, there was no intimation about the *Dutch*. The reason why the counsel have not objected to his not disclosing the grounds of this apprehension is, because it must have arisen from political speculation, and general intelligence: therefore, they agree, it is not necessary to communicate such things to an underwriter.

“ Lastly, Great stress was laid upon the opinion of the broker. But we all think, the jury ought not to pay the least regard to it: it is mere opinion; which is not evidence: it is opinion after an event: it is opinion without the least foundation from any previous precedent or usage: it is an opinion, which, if rightly formed, could only be drawn from the same premisses, from which the court and jury were to determine the cause: and therefore, it is improper and irrelevant in the mouth of a witness. There is no imputation upon the governor, as to any intention of fraud. By the same conveyance, which brought his orders to insure, he wrote to the company every thing, which he knew or suspected: he desired nothing to be kept a secret, which he wrote either to them or his brother. His subsequent conduct, down to the 8th of *February* 1760, shewed that he thought the danger very improbable. The reason of the rule against concealments is, to prevent fraud and encourage good faith. If the defendant's objections were to prevail, in the present instance, the rule would be turned into an instrument of fraud. The underwriter here, knowing the governor to be acquainted with the state of the place; knowing that he apprehended danger, and must have some ground for his apprehension; being told nothing of either, signed this policy without asking a question. If the objection, “ that he was not told,” is sufficient to vacate it, he took the premium, knowing the policy to be void, in order to gain, if the alternative turned out one way; and to make no satisfaction, if it turned out the other: he drew the governor into a false confidence, that if the worst should

happen, he had provided against total ruin; knowing, at the same time, that the indemnity, to which the governor trusted, was void. There was not a word said to him of the affairs of *India*, or the state of the war there, or the condition of *Fort Marlborough*. If he thought that omission an objection, at the time, he ought not to have signed the policy, with a secret reserve in his own mind to make it void: if he dispensed with the information, and did not think this silence an objection then; he cannot take it up now, after the event. What has been often said of the statute of frauds may, with more propriety, be applied to every rule of law, drawn from principles of natural equity, to prevent fraud: "that it should never be so turned, construed, or used, as to protect, or be a means of fraud." After the fullest deliberation, we are all clear that the verdict is well founded; and that there ought not to be a new trial: consequently, that the rule obtained for that purpose ought to be discharged."

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To have given this very elaborate and learned argument in the state in which it was delivered, certainly requires no apology; because from it may be collected all the general principles upon which the doctrine of concealments, in matters of insurance, is founded, as well as all the exceptions, which can be made to the generality of those principles. To have abridged such an argument, would have very much lessened the pleasure of the reader, and would have been an injury to the venerable judge, who in that form delivered the opinion of the court. The rules, then advanced and illustrated, have since been confirmed by the opinion of the judges upon similar questions.

The plaintiffs, *Planche* and *Jaquery*, merchants in *London*, insured goods, "on board the *Swedish* ship called the *Mary Magdalena*, lost or not lost, at and from *London* and *Ramsgate* to *Nantz*, with liberty to call at *Ossend*, being a general ship in the port of *London* for *Nantz*." There was a declaration in the policy, "that the insurance was made on account of certain persons carrying on trade under the name and firm of *Vallee* and *Dupleffis*, Monsieur *Lassau le jeune*, *Guillaume Albert*, et *Paitier de la Gueule*." The defendant underwrote the policy for 300*l.* at three guineas *per cent.* The ship's clearances from the custom-house in *London* and her other papers, were all made out for *Ossend* only, but the ship and goods were intended to go

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another v.
Fletcher,
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directly from *London* to *Nantz*, without going to *Ossend*. Bills of lading in the *French* language, dated the 18th of *July* 1778, were signed by the captain in *London*, but purporting to be made at *Ossend*, and that the goods were shipped there to be delivered at *Nantz*. The policy was subscribed by the defendant on the 7th of *July*. and the lading was taken in between the 24th of *July* and the 17th of *August*. The proclamation for making reprisals on *French* ships, bore date the 29th, and appeared in the *Gazette* on the 31st of *July*. Two underwriters had signed the policy after the proclamation, at the same premium of three guineas: one on the 31st of *July*, and the other on the 7th of *August*. The ship sailed on the 24th of *August*, and was taken by a king's cutter, on her way to *Nantz*. After her departure from *Gravesend*, the captain threw overboard all the papers which he had received from the custom-house at *London*. They had been obliterated by the custom-house officers at *Gravesend*, and were no longer of any use. The ship was released by the Admiralty, but the goods were condemned. The plaintiffs had no connection or share in the ship. Such were the material facts in this case, as they were stated this day by Lord *Mansfield* in his report, upon a rule to shew cause why there should not be a new trial. The cause had been tried at the last sittings at *Guildhall*, and a verdict found for the plaintiffs. The grounds for the application for a new trial were two: 1st, That there was a fraud on the underwriters, the ship having been cleared out for *Ossend*, and yet never having been designed for that place. 2dly, That as hostilities were declared after the policy was signed, and before the ship sailed, the defendant ought to have had notice, that he might have exercised his discretion, whether he would chuse for a peace premium to run the risk of capture. Beside the facts above mentioned, his lordship stated, that the plaintiff had produced evidence to shew, that all ships, going with goods of *British* manufacture to *France*, clear out for *Ossend*, without meaning to go thither; and that this is universally understood by persons concerned in that branch of commerce. The reasons suggested for clearing out for *Ossend*, and afterwards making bills of lading as from that place, were, that the light-house duties are saved, which are payable when the voyage is known to be directly down the channel: and that the *French* duties are less upon goods from *Ossend*, than from *England*.

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Lord Mansfield.—“ This verdict is impeached upon two grounds. 1st, It is said there was a fraud on the underwriters, in clearing out the ship for *Ostend*, when she was never intended to go thither. But I think there was no fraud on them: perhaps, not on any body. What had been practised in this case was proved to be the constant course of the trade; and notoriously so to every body. The reason for clearing for *Ostend*, and signing bills of lading as from thence, did not fully appear. But it was guessed at. The *Fermiers Generaux* have the management of the taxes in *France*. As we have laid a large duty on *French* goods, the *Frenab* may have done the same on ours; and it may be the interest of the farmers to connive at the importation of *English* commodities, and take *Ostend* duties, rather than stop the trade, by exacting a tax, which amounts to a prohibition. But at any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another. With regard to the evasion of the light-house duties, the ship was not liable to confiscation on that account. 2d, The second objection is, that the policy was made before, and the ship sailed after, the proclamation for reprisals. But every man in *England* and *France*, on the 17th of *July*, expected the immediate commencement of a war. I will not say it was actually commenced; but the ambassadors of both countries were recalled; the *Pallas* and *Licorne* were taken; the fleets were at sea; and, as it appeared afterwards, were waiting for each other to fight. It does not appear that the goods were *French* property; an *Englishman* might be sending his goods to *France* in a neutral ship. But it is indifferent whether they were *English* or *French*. The risk insured extends to all captures, and as two other underwriters signed at the same premium, after the proclamation, it appears that the war-risk was in view when the defendant signed. Shall he avail himself of an event, which increases the risk, but which he had in contemplation when he underwrote the policy? I am of opinion, that there should not be a new trial.” The three other judges concurred; and the rule was discharged.

A similar decision was made in the following case. It was an action on a policy of insurance on a *Portuguese* ship, at and from *Madeira* to her port of discharge in *Jamaica*, with liberty to touch at the *Leeward Islands*. The defendant underwrote 150*l.* upon it: the ship was captured by a *French* privateer, and condemned

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22 Geo. III.

in the Court of Admiralty in *France*, on the ground of having an *English* supercargo on board. The action was brought to recover this loss from the underwriter, who refused to pay, alleging, that the plaintiff should have disclosed to him, that the supercargo was *English*. At the trial, a verdict was given for the plaintiff, upon a case reserved for the opinion of the Court, and containing in substance the facts just stated.

For the defendant it was insisted, upon the argument, that the agent for the insured ought to have disclosed this fact; and that it was the more material in this case, because during the present war, an ordinance passed in *France*, similar to one made in the last war in 1756, which declares, that no *Dutch* ship shall be allowed to take on board a supercargo, belonging to any nation at enmity with the court of *France*: and that if any ship, having such supercargo, be taken, it shall be condemned as lawful prize.

Lord *Mansfield*.—"It is an oppressive and arbitrary rule, and contrary to the law of nations. If both parties were ignorant of it, the underwriter must run all risks; and if the defendant knew of such an edict, it was his duty to enquire, if such a supercargo were on board. It must be a fraudulent concealment of circumstances, that will vitiate a policy. But it is remarkable, that neither party has said a word, respecting the treaties between *France* and *Portugal*." Judgment was accordingly given for the plaintiff.

3d, We come now to the third great division of this chapter, namely, to cases in which policies are void by misrepresentation. Before we proceed to state the cases under this head, it will be proper to distinguish between a warranty and a representation. A warranty or condition is that which makes a part of the written policy, and must be literally and strictly performed; and being a part of the agreement, nothing *tantamount* will do, or answer the purpose. A representation is a state of the case, not a part of the written instrument, but collateral to it, and entirely independent of it; and it is sufficient, that a representation be substantially performed. The consequence of a breach of a warranty we shall take notice of hereafter. If there be a misrepresentation, it will avoid the policy, as a fraud, but not as a part of

of the agreement. Even written instructions, if they are not inserted in the policy, are only to be considered as representations; and in order to make them valid and binding as a warranty, it is absolutely necessary to make them a part of the instrument, by which the contract of indemnity is effected. If a representation be false in any material point, it will avoid the policy; and if the point be not material, the representation can hardly ever be fraudulent. The principle upon which the policy is void in such a case, we stated in the opening; that the underwriter has computed the risk upon circumstances, which were false, or which did not exist. These doctrines are fully established by a variety of judicial decisions.

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Upon a rule to shew cause why a new trial should not be granted in this case, Lord *Mansfield* reported as follows.—“This was an action upon a policy of insurance. At the trial it appeared in evidence, that the first underwriter had the following instruction shewn to him: “Three thousand five hundred pounds upon the ship *Julius Caesar*, for *Halifax*, to touch at *Plymouth*, and any port in *America*; *she mounts twelve guns and twenty men.*” These instructions were not asked for, nor communicated to the defendant: but the ship was only represented generally to him as a *ship of force*: and a thousand pounds had been done, before the defendant underwrote any thing upon her. The instructions were dated the 28th of *June* 1776, and the ship sailed on the 23d of *July* 1776; and was taken by an *American* privateer. That at the time of her being taken, she had on board 6 *four pounders*, 4 *three pounders*, 3 *one pounders*, 6 *half pounders*, which are called *swivels*, and 27 men and boys in all for her crew; but of *them*, 16 only were *men*, (not 20, as the instructions mentioned,) and the rest, boys. But the witnesses said, he considered her as being stronger with this force, than if she had 12 carriage guns, and 20 men: he also said (which is a material circumstance,) that *there were neither men nor guns on board, at the time of the insurance.* That he himself insured at the same premium, without regard or enquiry into the force of the ship. Other underwriters also insured at the same premium, without any other representation than that she was a *ship of force*. That to every four pounder, there should be five men and a boy. That in merchant ships, boys always go under the denomination of men, This was met by evidence on the

Pawson v.
Watson,
Cowp. 785.

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part of the defendant, saying, that guns meant *carriage guns*, not *swivels*; and men meant *able men*, exclusive of *boys*. There were three causes of the same nature depending upon the same evidence. The defence in each was, that these instructions were to be considered as a warranty, the same as if they had been inserted in the policy; though they were not proved to have been shewn to any but the first underwriter. In all the three cases, the question for the Court to determine, is, Whether the instructions, which were shewn to the first underwriter, are to be considered as a warranty inserted in the policy; or as a representation, which would avoid the policy, if fraudulent? If the Court should be of opinion, that the instructions amounted to a warranty, then a new trial is to be had in each without costs; otherwise, the verdicts, which were all for the plaintiffs, are to stand. At the trial I was of opinion, that it would be of very dangerous consequence, to add a conversation, that passed at that time, as part of the written agreement. It is a collateral representation, and if the parties had considered it as a warranty, they would have had it inserted in the policy. But secondly; if these instructions were to be considered in the light of a fraudulent misrepresentation, they must be both material and fraudulent: and in that light, I held, that a misrepresentation made to the first underwriter ought to be considered as a misrepresentation made to every one of them, and so would infect the whole policy. Otherwise, it would be a contrivance to deceive many: for where a good man stands first, the rest underwrite without asking a question: and if he be imposed upon, the rest of the underwriters are taken in by the same fraud." The case was left to the jury under that direction.

After argument at the bar, Lord *Mansfield* asked, Whether there was any case that made a difference between a written and a parol representation? No answer being given, his lordship proceeded: "There is no distinction better known to those who are at all conversant in the law of insurance, than that which exists between a *warranty* or condition, which makes part of a written policy, and a representation of the state of the case. Where it is a part of the written policy, it must be performed. As if there be a warranty of *convoy*, there it must be a *convoy*; nothing else will answer the idea intended by the warranty: it must be strictly performed, as being a part of the agreement;

for in the case of convey it might be said, the party would not have insured without convoy. But as, by the law of merchants, all dealings must be fair and honest, fraud infects and vitiates every mercantile contract. Therefore, if there be fraud in a representation, it will avoid the policy, on account of the fraud, but not on account of the non-compliance with any part of the agreement. If in a life-policy, a man warrant another to be in good health, when he knows at the same time he is ill of a fever, *that* will not avoid the policy on the ground of misrepresentation (though it will be void for non-compliance with the warranty); because by the warranty, the insured takes the risk upon himself. But if there be no warranty, and he say, "the man is in good health," when in fact he knows him to be ill, it is *false*. So it is, if he do not know whether he be well or ill; for it is equally false to undertake to say that which he knows nothing at all of, as to say *that* is true which he knows is not true. But if he only say, "he believes the man to be in good health," knowing nothing about it, nor having any reason to believe the contrary; there, though the person is not in good health, it will not avoid the policy, because the underwriter *then* takes the risk upon himself. So that there cannot be a clearer distinction than that which exists between a warranty, which makes part of the written policy, and a collateral representation, which, if false in a point of materiality, makes the policy void: but if not material, it can hardly ever be fraudulent. So far from the usage being to consider instructions as a part of the policy, that parol instructions were never entered in a book, nor written instructions kept, till a few years ago, upon occasion of several actions brought by the insured upon policies, where the brokers had represented many things they ought not to have represented, in consequence of which the plaintiffs were cast. I advised the insured to bring an action against the brokers, which they did, and recovered in several instances: and I have repeatedly, at *Guildhall*, cautioned and recommended it to the brokers, to enter all representations made by them in a book. That advice has been followed in *London*; but it appeared lately, at the trial of a cause, that at *Bristol*, to this hour, they make no entry in their books, or keep any instructions. The question then is, Whether in this policy the person insuring has warranted that the ship should positively and literally have 12 carriage guns and 20 men? That is, Whether the instructions given in evidence

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are a part of the policy? Now I will take it by degrees. The two first underwriters before the Court are *Watson* and *Snell*. Says *Watson*, "it is part of my agreement, that the ship shall fail with 12 guns and 20 men: and it is so stipulated, that nothing under that number will do: 10 guns with swivels will not do." The answer to this is, read your agreement; read your policy. There is no such thing to be found there. It is replied, yes, but in fact there is, for the instructions, upon which the policy was made, contain that express stipulation. The answer again is, there never were any instructions shewn to *Watson*; nor were any asked for by him. What colour then has he to say that those instructions are any part of his agreement? It is said, he insured upon the credit of the first underwriter. A representation to the first underwriter has nothing to do with that, which is the agreement or terms of the policy. No man who underwrites a policy, subscribes by the act of underwriting, to terms of which he knows nothing: but he reads the agreement and is governed by that. Matters of intelligence, such as that a ship is or is not missing, are things in which a man is guided by the name of a first underwriter, who is a good man, and to which another will therefore give faith and credit: but not to a collateral agreement, of which he can know nothing (a). The absurdity is too glaring, it cannot be. By extension of an equitable relief in cases of fraud, if a man is a knave with respect to a first underwriter, and makes a false representation to him in a point that is material; as where having notice of a ship being lost, he says she was safe; that shall affect the policy with regard to all the subsequent underwriters, who are presumed to follow the first. How then do *Watson* and *Snell* underwrite the ship in question? Without knowing whether she had any force at all. That proves the risk was equal to a ship of no force at all; and the premium was a vast one; eight guineas. So much therefore for those two cases. The third case is that of *Ewer*, who saw the instructions, with the representation which they contained. Did the number of guns induce him to underwrite

(a) This point, how far a representation made to the first underwriter shall be taken to extend to all the rest, was about to be discussed in a case of *Marsden v. Reid*, 3 East's Rep. 572. (See it for another point, ante, p. 37. and for another post. p. .) The facts did not sufficiently raise the question. But the Court seemed inclined to the affirmative, although the case had not proceeded far enough to require attention to Lord Mansfield's distinction.

the policy? If it did, he would have said, put them into the policy; warrant that the ship shall depart with 12 guns and 20 men. Whereas he does no such thing, but takes the same premium which *Watson* and *Snell* did, who had no notice of her having any force. What does that prove? That he is paid and receives a premium as if it were a ship of no force at all. The representation amounts to no more than this; I tell you what the force will be, because it is so much the better for you. There is no fraud in it, because it is a representation only of what, in the then state of the ship, they thought would be the truth. And in real truth the ship sailed with a larger force; for she had nine carriage guns and six swivels. The underwriters therefore had the advantage by the difference. There was no stipulation about what the weight of metal would be. All the witnesses say, that she had more force than if she had 12 carriage guns, in point of strength, of convenience, and for the purpose of resistance. The supercargo in particular says, "he insured the same ship and the same voyage, for the same premium, without saying a syllable about the force." Why then it was a matter proper for the jury to say, whether the representation was false, or whether it was in fact an insurance as of a ship without force. They have determined, and I think very rightly, that it was an insurance without force. *Ewer* makes an objection, that the representation ought to be considered as inserted in the policy; but the answer to that is, he has determined whether it should be inserted in the policy or not, by not inserting it himself. There is a great difference whether it shall be considered as a fraud. But it would be very dangerous to permit all collateral representations to be put into the policy. I am extremely glad to hear that a great many of the underwriters have paid. Mr. *Thornton* has paid, who was the first person that saw the instructions. Shall the rest refuse then? As to *Watson* and *Snell*, they have no pretence to refuse; for there is not a colour for the objection made by them. As to *Ewer*, we are all satisfied with the determination of the jury against him. Therefore the rule for a new trial must be discharged."

N. B. On the *Monday* following, Mr. *Davenport* said, he was desired by the underwriters to ask, Whether it was the opinion of the Court, that to make written instructions valid and binding as a warranty they must be inserted in the policy? Lord *Man-*

field

C H A P. *field* answered, that most undoubtedly that was the opinion of the Court: If a man warrant that a ship shall depart with 12 guns, and it depart with 10 only, it is contrary to the condition of the policy.

From the judgment pronounced in the cause just stated, we learn the difference between a warranty and a representation: we learn also, that a performance in substance will satisfy a condition expressed in a representation: but that nothing except a strict and literal compliance will fulfil the terms of the former: and we also are instructed in the whole doctrine of representation, as far as it affects the contract of insurance. The positions advanced in the above case were so satisfactory, that they have been adopted, as the ground of direction to juries, upon all questions of representation; and have been followed by the Court, whenever points of that nature have come before them for judgment.

Bize v.
Fletcher,
Sittings after
Easter Term
1779,
Guildhall,
Doug. Rep.
271.

This was an action on a policy of insurance on the ship *Carnatic East Indiaman*, "at and from *Port P'Orient*, to the isles of *France* and *Bourbon*, and to all or any ports or places, where and whatsoever, in the *East Indies*, *China*, *Persia*, or elsewhere, beyond the *Cape of Good Hope*, from place to place; and during the ship's stay and trade backwards and forwards, at all ports and places, and until her safe arrival back at her last port of discharge in *France*." But at the same time that this policy was subscribed, there was a slip of paper wafered to it, and shewn to the underwriters, on which was written the following representation: "The ship has had a complete repair, and is now a fine and good vessel, three decks. Intends to sail in *September* or *October* next (1776). Is to go to *Madeira*, the isles of *France*, *Pondicherry*, *China*, the isles of *France*, and *L'Orient*."

The ship did not sail till the 6th of *December* 1776, and did not reach *Pondicherry* till the 23d of *July* 1777. She continued there till the 23d of *August* following; when instead of proceeding to *China*, she sailed for *Bengal*, where having passed the winter and undergone considerable repairs, she sailed from thence early in the year 1778, (being the second ship that left the *Ganges*) returned to *Pondicherry*, and after taking in a homeward-

ward-bound cargo at that place, proceeded in her voyage back to *L'Orient*, but was taken in *October* in that year, by the *Mentor* privateer. The usual time in which the direct voyage between *Pondicherry* and *Bengal* is performed, is six or seven days; but the *Carnatic* was about six weeks in going to *Bengal*, and two months on the way back from thence to *Pondicherry*. Both going and returning, she either touched at, or lay off *Madras*, *Masulipatam*, *Vizagapatam*, and *Yanon*, and took in goods at all those places.

It was contended in this cause, at the trial, that the representation accompanying the policy restrained the voyage to the limits therein specified. They produced some letters from the owners to their correspondents, one of which was to the following effect: "We doubt not, but on account of the storm the ship will be forced to go to *Bengal* to be laid down, which cannot be done at *Pondicherry*; in which case our captain will have entered a protest, which we will forward in time to you." In a subsequent letter they say nothing of the storm or leak; but mention a different cause for the ship's going to *Bengal*. These letters, it was said, raised a presumption that the necessity of going to *Bengal* was merely a pretence devised after the capture, and when the insured began to apprehend that the words of the policy would not cover a voyage to that place.

Lord *Mansfield* told the jury, "that the first question was, Whether the policy was void, on account of misrepresentation? Now there is an essential difference between a warranty and a representation. The warranty is a part of the contract: a risk described in the policy is part of the contract. There can be no warranty by any collateral representation. The ground, on which a representation affects a policy, is fraud, the representation must be fraudulent, that is, it must be false and material in respect to the risk to be run. All risks are governed by the nature of them; and the premium is governed by the risk. Where a representation accompanies an instrument, it says, "I will have this understood as my present intention: "but I will have it in my power to vary it." The great question in this cause is, Whether the representation was false, and that in a material instance? Fraud is found out by the materiality of the point it is

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is charged in. It is to be considered, then, whether they had really a view of going to *China*. A witness has proved that the difference of insurance is one *per cent.* on going to *Bengal*, and not to *China*. If you think that this was a misrepresentation to avoid paying the *one per cent.* you will find for the defendant. But if you are satisfied that the real intention, at the time of the representation, was to go to *China*, the plaintiff will be entitled to your verdict: for the insured may change his intention, go to *Bengal*, and yet be protected by the policy, which clearly admits of that voyage, and must be understood by both parties in a greater latitude than the representation, being expressed in different and much more comprehensive terms. If, upon the whole evidence, you shall be of opinion, that no fraud was intended, and that the variance between the intended voyage, as described in the slip of paper, and the actual voyage as performed, did not tend to increase the risk to the underwriters, *this slip of paper being only a representation*, you must find for the plaintiff." The jury found a verdict accordingly. And although in several causes upon the same ship, new trials were moved for, and granted; yet in this, which was the only cause, in which there was a representation, the verdict was acquiesced in, and no motion respecting it ever was made.

Vide Dougl.
Rep. 271.

5 Burr.
1909.

In the outset of this chapter, we took notice of a very material rule respecting misrepresentation; and which it now becomes necessary to repeat. If a representation be made to the underwriter of any circumstance which was false, this, if it be in a material point, shall vacate the policy, and annul the contract, *although it happen by mistake*, and without any fraudulent intention, or improper motive on the part of the insured. We also stated, the principle, on which, in such a case, the contract is held to be void: because the insurer is led into error, and computes his risk upon circumstances not founded in fact; by which means the risk actually run is different from that intended to be run, at the time the contract is made. On this ground it is, that the contract is as much at an end, as if there had been a wilful and false allegation, or an undue concealment of circumstances. The doctrine here meant to be advanced will be better understood, and more fully illustrated, by attention to the following case:

It

It was an action on a policy of insurance on the ship, "the *Mary and Hannab*, from *New York* to *Philadelphia*." At the time when the insurance was made, which was in *London*, on the 30th of *January*, the broker represented the situation of the ship to the underwriter as follows: "The *Mary and Hannab*, a tight vessel, sailed with several armed ships, and was seen safe in the *Delaware* on the 11th of *December*, by a ship which arrived at *New York*." In fact the ship was lost on the 9th of *December*, by running against a *cheveau de frise*, placed across the river. The cause came on to be tried before Lord *Mansfield* at *Guildhall*. The defence was founded on the misrepresentation as to the time when the ship was seen; and the representation and the day of the loss being proved, the jury found for the defendant. A rule was obtained on the part of the plaintiff, calling upon the defendant to shew cause why there should not be a new trial. After argument at the bar,

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Macdowall
v. Fraser,
Doug. 247.
260.

Lord *Mansfield* said: "The distinction between a warranty and a representation is perfectly well settled. A representation must be fair and true. It should be true as to all that the insured knows; and, if he represents facts to the underwriter, without knowing the truth, he takes the risk upon himself. But the difference between the fact as it turns out, and as represented, must be material. The case of the *Julius Caesar* was very different from this. The ship there was only fitted out, when the insurance was made. No guns nor men were put on board. It was only said, what was meant to be done; and what was done, though different, was as advantageous, or more so, than what had been represented. There was no evidence of *actual fraud* in the present case, and no question of that sort seemed to be made. But there was a positive averment, that the ship was seen in the *Delaware* on the 11th of *December*. The underwriter was deceived as to that fact, and entered into the contract under that deception. There was no evidence at the trial *when* she was seen in the *Delaware*, or in what condition: but suppose the fact had been explained in the manner now suggested, why did the insured take upon him to compute the day of the month on which she had been seen? Why did he not mention exactly what his information was, and leave the underwriter to make the computation? In insurances on ships at a great distance,

their-

Vide Ante,
the case of
Pawson v.
Watson,
P.

CHAP. ^{X.} their being safe up to a certain day is always considered as a very important circumstance. I am of opinion, that the representation concerning the day was material."

Mr. Justice *Willer*.—"This is certainly only a representation; but, in an insurance on so short a voyage, it might have made a material difference whether the ship was known to be safe two days sooner or later. It ought to have been shewn, on the part of the plaintiff, that it was not material, but there was no evidence that the ship was met on the 9th, or any other day. The materiality was proper for the consideration of the jury."

Mr. Justice *Albhurst*.—"The distinction, which the court has made in the cases on the *Julius Caesar*, and some others, between a representation and a warranty, is extremely just. There is *no imputation of fraud* in this case; but the insured should have been more cautious. In the former cases, the representation was of what was intended; here it was of a fact stated as having happened, within the knowledge of the insured. He should have made the representation in the same words, in which the intelligence is said to have been communicated to him."

Mr. Justice *Buller*.—"We cannot say the difference of the day was not material. The safety of the ship is the most material fact of any, in cases of insurance. The plaintiff admits that the place where she was met in safety, was material. Why was not the time equally so? There was *no intentional deceit*, and it is perhaps unfortunate that the insured made *the mistake*; but I think the verdict right."

Shirley y.
Wilkinson,
B. R., Mich
22 Geo. III.
Doug. Rep.
306.

A similar decision was made by the same learned judges at a period subsequent to that of the case of *Macdowall and Fraser*.

Upon a motion for a new trial, Lord *Mansfield* and the rest of the court were clearly of opinion, that if the broker, at the time when the policy is effected, in representing to the underwriter the state of the ship, and the last intelligence concerning her, does not disclose the whole, and what he *conceals* shall appear *material* to the jury, they ought to find for the underwriter, the contract in such case being void; although the concealment should have been *innocent*, the facts not mentioned having appeared

peared *immaterial* to the broker, and having not been communicated merely on that account.

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But as has been said before, and as will appear from the cases already cited, in order to vitiate the contract, the thing concealed must be *material*, it must be *some fact*, and not merely a supposition or speculation of the insured; and the underwriter must take advantage of any misrepresentation the first opportunity, otherwise he will not be allowed to claim any benefit from it at a future period. If therefore the insured merely represent that he expects a thing to be done, the contract will not be void, although the event should turn out very different from his expectation.

Thus upon a motion for a new trial, one of the grounds stated to induce the court to grant it was, that since the trial, a material representation, which had been made to *Shulbred*, the first underwriter upon the policy, and which turned out to be false, had been discovered. *Shulbred* made an affidavit, by which it appeared, that when he signed the policy in *March 1778*, the broker was getting several others, on other ships, subscribed at the same time, all belonging to the same owner, and said, speaking of them all—"which vessels are *expected* to leave the coast of *Africa* in *November* or *December 1777*." In truth, the vessel in question had sailed in *May 1777*, and *Shulbred* swore, that if he had known that circumstance, he would not have signed. There had been actions brought against all the underwriters on the policy, except *Shulbred*.

Barber v.
Fletcher,
Dougk. 292.

Lord *Mansfield*.—"It has certainly been determined in a variety of cases, that a representation to the first underwriter extends to the others. But under what circumstances has the defendant gone to trial in this case? He certainly knew what had been represented to himself. He was acquainted with *Shulbred*, and had an opportunity of asking before the trial what had been represented to him. If therefore this evidence is *new*, it is owing to his own negligence. But the representation is not material: it was only an *expectation*, and the underwriters did not enquire into the ground of the expectation. This was lying by

Q H A P. till after a trial, in order to make an objection if the verdict
X. should be for the plaintiff." The rule was discharged.

There is another rule upon this subject, which it is material *particularly* to mention; although it may be collected from almost all the cases, that have already been quoted: and it is applicable to each of the three branches, into which this chapter has been divided. Wherever there has been an allegation of a falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial, whether such allegation or concealment be the act of the person himself who is interested, or of his agent; for in either case, the contract is founded in deception, and the policy is consequently void. The reason of this rule is nothing more than that which the law of *England* has for general convenience adopted, in treating of the relation between master and servant; declaring, that the master must always be responsible for the act of his servant, if done by his *express* or *implied* command. It would indeed be of very mischievous consequence, if a man might shelter himself from responsibility of any kind, by throwing the blame upon his agent: it would be to allow him to contradict a maxim of law, which says, that no man shall be suffered to make any advantage of his own wrong: and would overturn that wise principle of equity, that when one of two innocent persons (for the master may without danger to the argument be supposed innocent) must suffer for the fraud or negligence of a third, he who gave credit to that third person, shall bear the consequences arising from the confidence so reposed. If this be true, and it cannot be denied, of contracts in general, it must also be admitted in those of insurance, where, from the very nature of the case, the business is seldom transacted by the parties themselves; but is most commonly effected by the interposition of agents or brokers. The courts of justice have accordingly held, that any fraud in the agent of the insured vitiates and annuls the contract, as much as direct fraud in the insured himself: and this, although the act cannot be traced at all to the owner of the property; or even though he should be perfectly innocent.

Stewart and
 others v.
 Dunlop and

In a case before the House of Lords, so late as the year 1785, this doctrine was confirmed. It came before the House on an appeal

appeal from the Court of Session in *Scotland*, which had determined in favour of the respondents, the underwriters. The case was shortly this: a man having arrived at *Greenock*, knowing of the loss of the ship insured, and meeting a friend and intimate acquaintance of the insured, and a partner with him in some other adventures, communicated the intelligence of the loss of the ship to him, *who desired it might be concealed*. The same day as appears by the evidence, the person who had received this information held a conversation with the plaintiff's clerk, who made this deposition, "that neither at that time, nor at any other time of the said day, had he any conversation whatever with the said Mr. *Boog*, or message from him, either in writing or otherwise, relative to the *Peggy* (the ship insured), nor did he get any hint from him or any other person, relative to the making insurance upon her, further than the said Mr. *Boog's* asking the deponent if he knew whether there was any insurance made upon her, and if there was any account of her." After this conversation the plaintiff desired the clerk to write to get an insurance effected, which he did, without stating a word (at least it did not appear that he stated any) of this conversation to his master. Upon the whole of the evidence in this cause, although it did not appear by any deposition that the plaintiff knew of the loss of the ship at the time he made the insurance, the Lords of Session decreed, "that the insurance made by the plaintiff would not have been made, if the brigantine *Henrietta* had not arrived in the road of *Greenock* the day preceding, and brought intelligence that the ship *Peggy* was taken; and therefore that the policy was void." The House of Lords confirmed this decree.

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others, H.
Lords, det.
April 8,
1785.

In the decisions of the House of Lords, the reasons of the judgment never appear; and even when the learned judges give their opinions upon any cause then depending in that house, authentic reports of them are not easily obtained: the consequence of this is, that one is frequently left to conjecture upon what grounds the decree was pronounced. If we may be allowed to conjecture upon the case of *Stewart v. Dunlop*, it should seem, that as no direct or positive act of knowledge was brought home to the plaintiff himself, the conversation which the clerk had with Mr. *Boog*, was held to be a sufficient proof that the loss was known to him, at the time he wrote the letter,

C H A P. at the desire of the plaintiff, ordering the insurance. If known
X. to the clerk, the act of the agent in such a case becomes the
 act of the principal; because the law, upon general reasons of
 policy, will presume, that the principal must know whatever has
 come to the knowledge of the agent.

But in the end of the same year, a cause was decided in the King's Bench, expressly upon the point of fraud in the agent; for it appeared that the insured was not guilty of any improper conduct in the transaction. In that case the circumstances were numerous; and the judges gave their opinions *seriatim* upon the question.

Fitzherbert
 v. Mather,
 3 Term Rep.
 p. 12.

It was an action on a policy of insurance for 110*l.* underwritten by the defendant on the 21st of September 1782, at six guineas *per cent.* on a cargo of oats on board the ship *Joseph*, lost or not lost, at and from *Hartland* to *Portsmouth*, beginning the adventure from the loading thereof on board the said ship at *Hartland*. The defendant pleaded the general issue, and paid the premium into court. This cause came on to be tried before Mr. Justice *Buller* at *Guildhall*, when a verdict was found for the plaintiff, subject to the opinion of the court upon the following case:

That on the 27th of July 1782, *William Bundock* of *Pool*, agent for the plaintiff, contracted with *Richard Thomas* of *Hartland*, a corn factor, for the purchase of 500 quarters of oats, to be consigned to *William Fuller* at *Portsmouth*, on plaintiff's account; and desired *Thomas* to send him (*Bundock*) a bill of lading and invoice, and also a like bill of lading and invoice to the plaintiff at Mr. *Fisher's* at the *Tower*, *London*. That in pursuance thereof, *Thomas* shipped the oats on board the ship insured, which sailed from *Hartland* on the 16th of September 1782, and was lost the same day off the pier of *Hartland*. That on the 16th of September 1782, *Thomas* wrote the two following letters to *William Bundock* and to *Fisher*..

To Mr. WILLIAM BUNDOCK.

Sir,

Hartland, Sept. 16th, 1782.

This morning I loaded the *Joseph* with 175 quarters of oats to the address of *William Fuller, Portsmouth*, and the ship sailed
 imme-

immediately; but I am afraid the wind is coming to the westward, and will force her back. I have sent a bill of loading, and a letter by the master to Mr. Fuller: and also a bill of loading, and advice to Mr. Fisher, that he may insure, if he likes, as the equinox is near, &c.

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X.

R. THOMAS.

TO CUTHBERT FISHER, Esq.

Sir,

Hartland, Sept. 16, 1782.

By an order from Mr. William Bundock of Pool, I shipped this day on board the *Joseph*, which immediately set sail for Portsmouth, a cargo of oats as under; and by the same order as well as the order of Thomas Fitzherbert Esq. I took the liberty of drawing on you at three days sight, in favour of Messrs. Scott and Willis, or order, 106*l.* to be placed to the account of Thomas Fitzherbert Esq. I wish the whole safe to hand, and expect another vessel to be loaded this week, weather permitting: this evening appears stormy.

R. THOMAS.

Then follows the bill of lading. The case further states, that about six or seven o'clock of the evening of the 16th of September, Thomas heard a report that the ship was on shore; and at six o'clock in the morning of the 17th he knew the ship was lost. That the mode of sending letters from Hartland to London is as follows; the letters are collected by a private hand about one or two o'clock of the day on which the post sets out from Biddeford, from which place it goes about nine o'clock in the evening. That the 16th of September was not a post day; and the above letters did not leave Hartland till one o'clock in the afternoon of the 17th, which was the post day from Biddeford to London: and the letters which went from Biddeford by the post of that evening, were received in London on the 20th of September. That on the 19th, the plaintiff wrote the following letter to Fisher.

Stubb-Lodge, Portsmouth, Sept. 19th, 1782.

Dear Fisher,

My correspondent, Mr. Bundock, having informed me, that he has sent two sloops to Hartland in Devonshire, to load oats on my

C H A P. account and risk, I beg the favour of you to insure my amount
 X. of the cargoes to *Portsmouth*, as soon as the bills are sent you.

T. FITZHERBERT.

That the last-mentioned letter, together with the former from *Thomas*, dated *September 16th*, were received by *Fijber* in *London*, on the 20th of *September*; and he thereupon directed the insurance in question to be effected: that on the 21st, defendant subscribed the policy. Upon this case, after argument at the bar,

Lord *Mansfield* said: "This policy is effected by misrepresentation, and that misrepresentation arises from the proper agent of the plaintiff, who gives the intelligence. Now whether this happened by fraud or negligence, it makes no difference; for in either case, the policy is void. As to the misrepresentation, the underwriter was warranted on the information of the agent to take for granted that the ship was safe at 12 or 1 o'clock of the 17th of *September*; for the agent gives an account of the ship being loaded, and says, "I wish the whole safe to hand." Then there was a strong ground to believe on his letter, that she was safe when the post came away; and the post-mark shews the day when the letters were sent. How does this misrepresentation come? Why from *Thomas*, who writes to *Fijber*, and gives him notice of the ship's sailing, on purpose that he may insure; for so he says expressly in his letter to *Bundock*. He was honest at the time he wrote the letter; but on the 16th, at night, he hears that the ship is gone ashore, and the next morning he knew that she was absolutely lost. The post did not go out till the afternoon of that day; and he had full opportunity to send an account of the loss. If *Thomas* were not guilty of fraud, at least he was guilty of gross negligence: but either way, if *Thomas* were perfectly innocent, this policy, being effected by misrepresentation, is void."

Mr. Justice *Willes*.—" *Thomas* is most clearly to be considered as the agent of the plaintiff. He shews by his letter to *Fijber*, that he acts as well by the orders of *Fitzherbert* as of *Bundock*. If then *Thomas* be the agent of the plaintiff, he is most certainly liable for his misrepresentation; and in this case the misrepresentation is gross."

Mr.

Mr. Justice *Ashurst*.—"On principles of policy, it is necessary that a man should be answerable for the acts of his agent. It is often difficult to prove the privity of knowledge; and therefore the law will presume, that facts known to the one, are also within the knowledge of the other. Nor is there any hardship on the plaintiff; for if this fact had been known, the policy could not have been effected."

Mr. Justice *Buller*.—"In order to shew, that *Thomas* was not the agent of the plaintiff, the counsel has assumed a fact, which is contrary to the case; for it is said, that the insurance was not made in consequence of *Thomas's* letter. But what is the fact? The plaintiff's letter to *Fisher* desires him to insure, as soon as the bills of lading are sent. By whom were they to be sent? By *Thomas*; then he refers to *Thomas* for all the information, and as the foundation of the insurance. The plaintiff, I dare say, is innocent; and so is the defendant. But if the plaintiff build his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer. It is the common question every day at *Guildhall*, when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit. In this case, the plaintiff trusted; not the defendant: *Thomas* had very material information, which he did not communicate; the consequence of which is, that the policy is void, and the *possession* must be delivered to the defendant."

From these cases, the principle, which we ought to establish, is evident, *viz.* that whether the fraud or misrepresentation be the act of the insured, or of his agent, the policy is void, and the contract between the parties is vacated and annulled.

To have troubled the reader with all the cases that have come to trial upon the ground of fraud, would have swelled this chapter to the size of a volume; and at the same time would be wholly unnecessary, as every case of fraud must depend upon its own circumstances. It was thought sufficient to lay down the general principles, which the Courts have adopted upon the subject, and which are applicable to each division of it as stated in the beginning of this chapter; and to cite two or three cases under each

C H A P. each head, in order to confirm and illustrate the positions and
 X. principles advanced.

Roccus,
 Not. 51. 78.

But as fraud is a charge of a very serious nature, materially affecting a man's credit, character, and reputation, the law of *England* will never presume that any one is guilty of it; nor set aside a contract on that ground, unless it be *fully and satisfactorily* proved. The consequence of this favourable presumption is, that the burden of proof lies upon the person who wishes to avail himself of the fraudulent conduct imputed. Thus if the insured is supposed to be guilty of fraud, the proof of it falls upon the underwriter; because he is the person, who is to derive a benefit from substantiating the charge. This is not only the law of *England*, but the law of common sense, founded on principles of equity and justice. Although it has been said, that fraud will not be presumed, unless it be *fully and satisfactorily proved*, it is not intended to convey an idea, that there must be a *positive and direct* proof of fraud, in order to annul the contract. The nature of the thing itself, which is generally carried on in a secret and clandestine manner, does not admit of such evidence; and therefore, if no proof but that of actual fraud were allowed in such cases, much mischief and villainy would ensue, and pass with impunity. Circumstantial evidence is all that can be expected; and indeed, all that is necessary to substantiate such a charge. The prejudice entertained against receiving circumstantial evidence, is carried to a pitch wholly inexcusable. In the case before us, we have already shewn, it must be received; because the nature of the inquiry for the most part admits of no other, and consequently it is the best possible evidence that can be given. But taking it in a more general sense, a concurrence of circumstances (which we must always suppose to be properly authenticated, otherwise they weigh nothing) forms a stronger ground of belief, than positive and direct testimony generally affords; especially when unconfirmed by circumstances. The reason of this is obvious: a positive allegation may be founded in mistake, or what is too common, in the perjury of the witness: but circumstances cannot lie; and a long chain of well connected fabricated circumstances, requires an ingenuity and skill rarely to be met with; and such a consistency in those who come to support those circumstances, by their oaths,

as the annals of our courts of justice can seldom produce. Besides, circumstantial evidence is much more easily discussed, and much more easily contradicted by testimony, if false, than the positive and direct allegation of a fact, which, being confined to the knowledge of an individual, cannot possibly be the subject of contradiction founded merely on presumption and probability.

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Another question upon this subject remains to be discussed; and that is, whether the underwriter is bound to return the premium, or is liable to an action for it, in a case where fraud has been proved against the insured; and consequently where the contract is void, and no risk has been run. The ordinances of *France* declare, that if fraud be proved against the insured, he shall be obliged to restore to the insurer that which he has received from him, and also to pay him double the premium: and if fraud be proved against the insurer, he shall in like manner be liable to restore the premium, and to pay double the sum insured to the owner of the property. A learned commentator upon these ordinances observes, that if this article suppose a full conviction of the crime, the punishment is too small; and that here the punishment of the assurer and assured is nearly equal, although the crime of the assured is much greater, when the difference between the premium, and the value of the property is considered. Indeed, the idea of enriching one man by the punishment of another is itself a strange one; and somewhat inconsistent with the present notions of criminal justice. The ground upon which it has been introduced into the edicts of *France* upon insurances, must have been this, that as the insurer in one case, and the insured in the other, runs a considerable risk by fraudulent allegations or concealments, they shall severally be entitled to the sums stated in the ordinance, as a recompence for the risk they so incurred.

Ord. of Lew.
14. tit. Ins.
art. 41.

2 Valin, 96.

The law of *England* was for a long time silent upon this subject, there being no positive declaration of the legislature respecting it: and our courts of justice had not till lately adopted any general rule, with respect to the return of premium in cases of fraud. In two or three instances in the Court of Chancery, where the underwriters have been relieved from the payment of the

C H A P. X. the sums insured on account of fraud, the decree has directed the premium to be returned.

Whitting-
ham v.
Thornbo-
rough, Pre-
cedents in
Chancery,
p. 20. and
3 Vern. 206.

Thus in a case in the year 1690, the defendant and others had come to the insurance office, and bought a policy for insuring the life of one *Horwell* (upon whose life they had no concern or interest depending) for a year; and the policy ran whether interested or not interested, at a premium of *5l. per cent.* They took this way of drawing in subscribers: they agreed with one *Marwood*, a known merchant upon the Exchange, and a leading man in such cases, to subscribe first; but in case *Horwell* died within the year, *Marwood* was to lose nothing, but on the contrary was to share what should be gained from the other subscribers. Upon the credit of *Marwood*'s subscribing, several others (who had inquired of *Marwood* about *Horwell*, who was his neighbour) subscribed likewise. *Horwell* lived about four months, and then died; and this bill was brought to be relieved against the policy: and this matter being all confessed by the answer, the Court decreed the policy to be delivered up, and the premium to be repaid.

Da Costa v.
Scandret,
2 P. Wms.
170. Vide
ante, p. 247.

So also in the case of *Da Costa v. Scandret*, which has already been cited in a former part of this chapter, Lord *Macclesfield*, although he held the policy to be void, on the ground of fraud, decreed the premium to be returned to the insured.

It is true, that during the argument in the case next to be quoted, the counsel cited a case of *Racker v. Hollingbury*, in which the Master of the Rolls had been of a different opinion from that delivered in the two preceding cases. But Lord *Mansfield* said, that there must be some mistake in reciting the case before the Master of the Rolls: for the practice of the Court of Chancery was certainly agreeable to the two former cases.

Wilson v.
Duckett,
3 Burr.
1361.

The case, in which this observation was made, was an action on a policy of insurance on a ship, with a count of a general *indebitatus assumpsit* for money had and received to the plaintiff's use: and damages were laid at 98*l.* The trial was had, under a decree of the Court of Chancery, where the now defendant

the

the insurer, being there complainant, *had offered to pay back the premium, which was 10l.* No money was, in the present case, paid into court, though the usual course in these cases is for the defendant, the insurer, to bring the premium into court. The jury found a verdict for the plaintiff, for the ten pounds premium, on the count for money had and received to his use; although they were of opinion against the policy, upon the foot of fraud; and found against it, as being fraudulent. In fact, the first underwriter was only a decoy-duck, to induce other persons to underwrite the policy: and it had been previously agreed between the insured and him, that he should not be bound by signing the policy; which this court considered as a fraud, and therefore that the jury had given a right verdict in finding the policy fraudulent. With the concurrence of Lord *Mansfield* (before whom this cause was tried) and of the counsel on both sides, it was agreed to bring this question before the court, whether, upon a policy of insurance being found fraudulent, the premium should be returned to the plaintiff (the insured) or retained by the defendant (the insurer). The cases abovementioned were quoted by the counsel for the plaintiff; but they being all in Chancery, Lord *Mansfield* said, he wanted to know whether there was any common law determination to the same effect. As it did not appear that there was, his lordship said, It was plain what must be done in this case; for he looked upon *the offer made* by the complainant's bill in equity, to be the same thing as if the money had *actually been brought into court* in the present case.

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But although the common law has been so silent upon the subject, as not to lay down any general rule; and although in all the cases stated, the premium was restored; yet if the fraud is notorious, palpable, and gross in its nature, the court may order, and has ordered, the underwriter to retain the premium.

Thus where an action was brought by the insured to recover 150*l.* being the amount of the defendant's subscription; the ground of refusal was, that the insurance was fraudulent; and that the plaintiff knew of the loss of the ship at the time of effecting the policy. The counsel for the plaintiff were under the necessity of admitting that their client had made some fraudulent insurances upon this very ship, subsequent to the one

Tyler v.
Horne, Sit-
tings at
Guildhall
after Hil.
T. 1783.

now

C H A P. X. now in dispute ; but contended that the news of the loss of the ship had not arrived, till after this particular one was effected. The evidence, however, was so strong as easily to convince the jury, that the plaintiff had received information of the loss before the order for making the insurance was given to the broker ; and they found a verdict for the defendant.

Lord *Mansfield* said, The fraud was so gross, that the premium should not be recovered from the underwriter.

Chapman
and others,
Assignees of
Kennet, v.
Frazer,
B. R. Trin.
33 Geo. III.

At last this great question came to be expressly decided, where the agent of the assured only had been the guilty person ; and the whole Court of King's Bench were of opinion, that in all cases of *actual* fraud on the part of the assured or his agent, the underwriter might retain the premium (a).

3 Bur.
1909.

It is proper also here to observe, that it has been laid down as clear law, that if the underwriter has been guilty of fraud, an action lies against him, at the suit of the insured, to recover the premium. Thus it was said by Lord *Mansfield*, in the case of *Carter v. Boehm*, which has already been quoted at large in this chapter: "the policy would be void against the underwriter, if he concealed any thing ; as, if he insured a ship on her voyage, which he privately knew to be arrived ; and an action would lie to recover the premium."

Ord. of Am-
sterdam,
art. 56.
2 Mag. 146

By several of the foreign ordinances, the punishment of fraud, in matters of insurance, is exceedingly severe. By those of *Amsterdam* it is declared, "that as contracts of insurance are contracts of good faith, wherein no fraud or deceit ought to take place, in case it be found, that the insured or insurers, captains, shippers, pilots, or others used fraud, deceit or craft, they shall not only forfeit by their deceit and craft, but shall also be liable to the loss and damage occasioned thereby, and be corporally punished for a terror and example to others ; even with death, as pirates and manifest thieves, if it be found that they have used notorious malversation or craft." The ordinances of *Middleburg* contain a provision exactly in the same words. At *Stockholm* also, it has been declared, that such an offender, besides restitution to the party injured, shall, according

Art. 30.
2 Mag. 76.
2 Mag. 188.

(a) See post. ch. 19. where the question of return of premium on insurances illegal and void is discussed.

to the circumstances of every particular affair, be punished in his estate, honour, and life. C H A P.
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Frauds in contracts of insurances have not as yet had any punishment affixed to them by the laws of *England*, that I have been able to learn; but there are one or two cases which have been declared to be felonies by positive statutes, where the act committed has been to the prejudice of the underwriters.

By a statute in the reign of queen *Anne*, it was enacted, that if any captain, master, mariner, or other officer, belonging to any ship, shall wilfully cast away, burn, or otherwise destroy, the ship, unto which he belongeth, or procure the same to be done, to the prejudice of the owner or owners thereof, or of any merchant or merchants that shall load goods thereon, (or by a subsequent statute, to the prejudice of any person or persons that shall underwrite any policy or policies of insurance thereon,) he shall suffer death as a felon; and the benefit of clergy is taken away from this offence by 11 *Geo. I. ch. 29.* 1 Ann. st. 2.
c. 9. s. 4.
4 Geo. 1.
c. 12. s. 3.

These are the only provisions, which the legislature of this country has, as yet, thought proper to make for the prevention of crimes of this enormity: but as the records of our courts of justice evidently prove that frauds are too frequent in policies of insurance, greater severity than merely annulling the contract seems necessary, in order to put a stop to such offences.

CHAPTER THE ELEVENTH.

Of Sea-worthiness.

CHAP.
XI.

HAVING in the preceding chapter treated very fully of the influence which fraud has upon the contract of insurance; we proceed to shew, that other circumstances, in which no fraud whatever can be discovered, or even suspected, will also vitiate and annul the policy. Of this nature is the doctrine of Sea-worthiness. Upon this point it has been determined, that every ship insured must, at the time of the insurance, be able to perform the voyage, unless some external accident should happen; and if she have a latent defect wholly unknown to the parties, that will vacate the contract; and the insurers are discharged. This doctrine is founded upon that general principle of insurance law, that the insurers shall not be responsible for any loss arising from the insufficient or defective quality or condition of the thing insured.

There is in the contract of insurance a tacit and implied agreement that every thing shall be in that state and condition, in which it ought to be: and therefore it is not sufficient for the insured to say, that he did not know that the ship was not seaworthy; for he *ought* to know that she was so, at the time he made the insurance. The ship is the *substratum* of the contract between the parties; a ship not capable of performing the voyage is the same, as if there were no ship at all; and although the defect may not be known to the person insured, yet the very foundation of the contract being gone, the law is clearly in favour of the underwriter; because such a defect is not the consequence of any external misfortune, or any unavoidable accident, arising from the perils of the sea, or any other risk, against which the underwriter engages to indemnify the person insured. To support a contrary doctrine would introduce a variety of frauds, as it would probably subject the underwriter to account for the loss, diminution, or waste, which may happen from the necessary and ordinary use of the thing insured; or the wear

and tear of the ship in the common course of the voyage : and all of these are risks, to which the insurer has never been considered as exposed. From what has been said it appears, that the ground of decision in this case is perfectly distinct from any principle of fraud : that it depends merely upon this, that the insured is presumed to be better acquainted with the state and condition of his ship than any other man ; and that he has tacitly undertaken, that she is in a condition to perform the destined voyage. In the cause of *Garter v. Boehm*, which was decided in *Easter term 1766*, Lord *Mansfield*, in discoursing upon the case then before him, affirms the law respecting the necessity of a ship being sea-worthy when she is insured : for he says, "The utmost
 3 B. 11.
 1913.
 " that can be contended for is, that the underwriter trusted to
 " the *fort* being in the condition in which it ought to be ; in like
 " manner as it is taken for granted, that a ship insured is sea-
 " worthy." But although the insured ought to know whether his ship was sea-worthy or not at the time she set out upon her voyage ; yet he may not be able to know the condition she may be in, after she is out a twelvemonth : and therefore, whenever it can be made appear, that the decay, to which the loss is attributable, did not commence till a period subsequent to the insurance, as she was sea-worthy at the time, the underwriter, it is presumed, would be liable. Indeed, in a late case upon another point, but where the same principle was much relied upon, Lord *Mansfield* said, " By an implied warranty every ship insured must be tight, staunch, and strong : but it is sufficient
 5 Burr.
 2804.
 " if she be so at the time of her sailing. She may cease to be so
 " in twenty-four hours after departure, and yet the underwriter
 " will continue liable (a)." Every case of this kind, it is true, must depend upon its own circumstances ; but when they are once ascertained, the rule of law is clear and decisive. The most material case upon this subject in the law of *England* is that of the *Mills* frigate, which underwent a variety of discussion in several courts, and in which all the principles on which this doctrine is founded were fully discussed. I have used my utmost endeavours to procure a copy of the opinions of the judges upon

Eden v.
 Parkinon,
 Dougl. 732.

(a) But if a ship sail upon a voyage, and in a day or two become leaky, and founder, or is obliged to return to port without any storm, or visible or adequate cause to produce such an effect, the presumption is, that she was not sea-worthy when she sailed ; and the jury, upon the plaintiff's own case, may draw such a conclusion. *Moor. and another v. Vandam*. Sittings at Guildhall before Lord Kenyon att.r Michaelmas Term 1794.

C H A P. that case ; but they have been ineffectual : therefore the reader
 { XI. must be satisfied with a full statement of the circumstances, as
 they appeared upon the demurrer to the evidence.

Before the proceedings in this case are stated, it will be necessary to mention, that an action had been brought in the court of Common Pleas on the same policy against one of the underwriters ; and Lord *Camden*, who tried that cause, directed the jury to find a verdict for the plaintiff : but upon a motion for a new trial, his Lordship declared, that he had changed his opinion : and the whole court of Common Pleas laid down the principles above stated, and directed a new trial. Upon the second trial, Lord *Camden* stated to the jury the opinion he had formed upon the subject, and a verdict was accordingly given for the defendant, which, upon a subsequent application, the court of Common Pleas refused to set aside. The plaintiffs then commenced a new action in the court of Exchequer against another of the underwriters, and which is now the subject of our attention.

Mills and
 another v.
 Roebuck.
 In the Ex-
 chequer.

This was an action on a policy of insurance, lost or not lost, at and from the *Leeward Islands* to *London*, warranted to sail on or before the 26th of *July*, upon any kind of goods, wares, and merchandizes ; and also upon the body, tackle &c. of and in the good ship or vessel called the *Mills Frigate*, beginning the adventure on the goods from the loading thereof on board the said ship at *St. Kitt's*, and upon the ship from her arrival at the *Leeward Islands*. The defendant undertakes to indemnify against the usual risks, for a premium of 2*l.* 10*s.* per cent. The loss was described in the first count of the declaration in these words : “ That the said ship, after her departure from *Nevis* on her “ voyage, and during her said voyage, sailing and proceeding “ on the high seas by and through the force of winds and tem- “ pestuous weather, and by and through the mere perils and “ dangers of the seas, sprang divers leaks, and became very “ leaky, crippled, bulged, disjointed, split, and wholly lost.” In the second count the loss is alleged thus : “ by and through “ the mere perils and dangers of the seas, and by the starting “ and loosening of one or more plank or planks of the said ship, “ and by accidentally springing one or more leak or leaks, the “ said ship became very leaky, crippled, &c. and totally unable

“ to

“to proceed on, or perform the said voyage.” There were two other counts in the declaration upon a policy on freight to recover from the underwriter the amount of his insurance upon that also ; and a fifth count for money had and received to the plaintiff’s use. The defendant pleaded the general issue ; and paid the premiums into court.

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This cause came on to be tried before Lord Chief Baron *Parker* ; and the defendant demurred to the evidence produced on the part of the plaintiff. The demurrer follows in these words : Thereupon the said *John and Thomas Mills* (the plaintiffs) shew in evidence to the jury to prove and maintain the issue within mentioned on their part, to wit, that the defendant underwrote the policy of insurance, and that the plaintiffs were interested to the amount as in the declaration is mentioned : That the ship in question was a *French*-built ship, and known to be so to the defendant at the time he underwrote the said policy : That the timbers of *French* ships are usually fastened with iron bolts or spikes, which are liable to grow rusty : and when the same are grown rusty, the timbers of such ships frequently become loose at once, and the ships are rendered incapable of bearing the sea, without any perceptible symptoms of decay : that the ship in question was purchased by the plaintiffs in the year 1757 ; that since that time she has been generally employed by the plaintiffs, who are *West India* merchants, in that trade ; and large sums have constantly been insured on her and her cargoes ; that in *February 1764*, being bound to the *Leeward Islands*, and back again to *London*, she failed on her voyage ; that before she failed from *London* on that voyage, the plaintiffs ordered the captain to have every thing done to the ship, which he should think proper to repair her : That in pursuance of such orders, the ship was put into dock and repaired, where the ship-carpenter did all such repairs to her as he was ordered, the expences of which amounted to about 100*l.* of which about 30*l.* was for the sheathing and other repairs of her hull, and the residue in her upper works : that nothing more appeared to the ship carpenter, or the captain, to be wanting to make her fit and complete for the said voyage ; but her iron bolts and spikes were not then examined, which could not be done without taking off her sheathing ; an act never done where (as the case is here) the ship had been sheathed a little time before :

C H A P. that *George Hayley*, esq. the first underwriter on this policy, and
XI. many other persons by whom policies of insurance are generally underwritten, keep a register, in which all ships usually insured by them, are entered, with an account of the age, construction, and visible goodness of the vessels, and to whom they belong, and also employ a surveyor, whose business it is to survey such ships: that the ship in question, at the time of underwriting the policy, and long before, had been entered in such register; and previous to her last outward-bound voyage, had been surveyed by one *Thomas Whitewood*, who was then employed by the said *George Hayley*, and other underwriters, as such surveyor; and as far as appeared to the said *Thomas Whitewood*, was in good condition, and perfectly fit to undertake a voyage to and from the *Leeward Islands*; but the surveyor did not, neither could he, examine the bolts and spikes for the reasons aforesaid; but did survey, as far as is ever practised, in such cases: that the said *George Hayley* had often before underwrote policies on the said ship and her cargoes; and the witness, who was the insurance broker, said he believed *Mr. Hayley* knew as much of the condition of the said ship as the plaintiffs did, and particularly on the outward-bound voyage to the *Leeward Islands*, he underwrote 400*l.* on this ship: that in such last outward-bound voyage, the ship met with a great deal of bad weather; was very leaky, and could not get into *Madeira*, where she was ordered to touch; but was obliged to bear away for the island of *Nevis*: that she arrived at the island of *Nevis* on the first of *April* 1764, and from thence went to the island of *Saint Christopher*, where she delivered her outward-bound cargo, and had such repairs done to her, as were then thought necessary, and to all appearance put into a proper condition for her voyage home; but her bolts and spikes were not, nor could be examined there: that about the end of the said month of *April*, the ship sailed from *St. Kitt's* to *Nevis*, where the captain had been promised a loading for her home: that on her arrival at *Nevis*, the planters, knowing she had been leaky in her outward-bound voyage, were not willing to put sugars on board her; and that in order to satisfy the planters there, that she was in a proper condition to carry a cargo of sugars to *London*, they proposed to the captain, as a measure which would be fully satisfactory to them, that he should submit the ship to be surveyed by all the captains then in the harbour, being six in number; and told him, that if they should

Should report her to be fit for a voyage to *London*, they would then load her with sugars: that the captain did submit to such survey, though it would have been for the interest of the said captains to report the ship unfit for the voyage; as by that means they would have had an opportunity of gaining more freight and sooner: that on the 8th day of *May* 1764, the said captains, after having surveyed her carefully, but without examining her bolts and spikes, which could not be done there, signed the following report: "*Nevis, May 8th, 1764. At the request of captain George Finch, of the ship Mills Frigate, we the subscribers did repair on board the said ship, and after due examination, it did appear to us, that the occasion of the ship's making more water than usual on her voyage from London to this place, was occasioned by some neglect in caulking the said ship, which may very easily be made tight, the said ship otherwise appearing to us to be strong and sound; and when caulked, we are of opinion, will be fully sufficient to carry a cargo of sugars to London, John Shepherd, &c.*" That afterwards the ship was caulked according to the said report, and that thereupon the planters sent their sugars on board, and the ship was soon loaded with about three hundred and seventy hogheads of sugar: that during the time of her loading, and until and at the time of her sailing, which was about two months, the ship continued tight, appeared to be in good condition, and made no more water than the best ships usually do, and are expected to do: that the ship sailed from *Nevis* on the 26th day of *July* 1764, about eight o'clock in the evening, and the next day, about four o'clock in the afternoon, without any bad weather or extraordinary swell of the sea, she sprang a leak, and the captain was obliged to bear away for *St. Christopher's*, where he arrived on the 28th of *July*: that on his arrival there, he got the ship unloaded to see what was the matter with her, when it appeared that she had started a plank; that he thereupon applied to the judge of the Court of Vice-Admiralty for a warrant to survey the ship; and a warrant was granted to four captains, and two ship carpenters, or any three of them: four of whom did, according to such warrant, survey the said ship, and did report, that she was unfit to proceed on her voyage without being thoroughly repaired: and that the expence of so repairing her there, would amount to more than the value of the ship and freight; and she was therefore condemned by the said court as

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unfit for the said voyage : that some of the iron bolts and spikes with which the timbers of the ship in question, like other *French*-built ships, were fastened, were broken in the plank that was so started, which the captain and the said surveyors felt, by passing up their hands between the plank and the ship ; and which appeared upon farther opening the ends of the plank ; and that the said plank was started from one end to the other : that it was owing to the said bolts and spikes being grown rusty and decayed, as then appeared to the captain and surveyors, that such plank started : that he believed the surveyors, who condemned her, thought the same ; wherefore, and supposing the other bolts and spikes in the ship were also grown rusty and decayed, though that could not be known for certain, without ripping off her planks, and making a more strict examination, the surveyors made their said report of condemnation : that the said plank was not taken off, nor could it be, without sinking the ship, which has not yet been broken up, but continues at *St. Christopher's* as a hulk : that on the aforesaid account, it was then concluded, and is now believed by the captain, *that the said ship was not fit for the insured voyage home, at the time she so sailed from Nevis for London, though, to all outward appearance, she was a very good ship, and, as he then believed, proper for the voyage ; and such a ship as he, from her outward appearance, should have had no objection to sail in again ; but had he known the decayed condition of her said bolts and spikes before he set sail on his homeward bound voyage, he would not have ventured his life in her : that there is no dock, nor scarce any materials for repairing ships at St. Christopher's, nor could she sail to any other place to be repaired ; and that if this misfortune had happened in North America, or England, where there are proper docks and materials, she might have been repaired for three or four hundred pounds ; that while the said ship was first at St. Christopher's, before she had taken in her cargo, namely, on the 23d of April 1764, the captain wrote the following letter to the plaintiffs :*

“ Gentlemen, *St. Christopher's, April 23, 1764.*
 “ I take the first opportunity of acquainting you, that I arrived at *Nevis*, after a most dismal passage, on the first instant.
 “ On the sixth of *March*, at day-break, I made the islands *Deserts*, distant about four leagues, ran down for *Madeira*, with
 “ a fresh gale at E. S. E. till four in the afternoon, when being
 “ within

“ within a mile off the shore, and judging about five or six miles
 “ off *Fenchall Road*, a very hard and dark squall took us suddenly
 “ with such violence, that I was obliged to clear off the land under
 “ the courses. It was excessively hazy the whole evening after,
 “ that one could hardly see the ship’s length; so that it would
 “ have been the greatest imprudence to have run the risk of
 “ overshooting our port, or running ashore. The gale increased,
 “ and, in the night, came round to the N. E. and the ship
 “ strained so much by the pressure of sail we were obliged to carry on
 “ her in that great sea, that it was with the utmost difficulty we
 “ could keep her free. On the eighth, at nine in the morning,
 “ reckoning myself nineteen leagues to leeward of *Madeira*, our
 “ ship so loosened, that we could not carry sail upon a wind; and
 “ seeing no probability of the wind shifting or abating enough
 “ to give us a chance of beating up, bore away for *Nevis*, judg-
 “ ing it better for the preservation of the whole than to run any
 “ hazard in endeavouring for the *Canaries* in our weak, leaky,
 “ and distressed condition. I have consulted with Mr. Cottle,
 “ the counsellor here, who advises me to sell the flour and lime
 “ at publick vendue, and to carry the iron hoops, &c. back to
 “ *England*. As the ship’s complaint has been chiefly in her upper
 “ works, I am obliged to have her new nailed from the wail up-
 “ wards; and hope you will find that what repairs are necessary
 “ to be made here, are conducted with all the frugality circum-
 “ stances will admit of.”

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That the plaintiffs received this letter in *London* on the 13th day of *June* 1764, and, a day or two afterwards, gave it to *Matthew Towgood*, an insurance broker, to get 100*l.* insured on the freight home for the use of the owners, and 25*l.* on their fourth part of the said ship: that the said *Towgood* first shewed the policy in question, and the letter to the said *George Hayley*, on the 19th of *June* 1764, who, after reading over the letter, asked him what interest he had to insure; to which the broker answered, ship, freight, and cargo; and that he might write which he pleased: that thereupon the said *George Hayley* said he would underwrite the ship, saying she would come home safe enough, notwithstanding the damage which the said letter imported she had received, as it was a summer voyage; but that she would very likely damage her cargo: that the said *George Hayley*

C H A P. *Hayley* was going to underwrite the said policy for 300*l.* on the
 XI. said ship, and had wrote the figure 3 : but on the said *Matthew Towgood's* telling him, he was a bold man to write three hundred pounds after reading the said letter, the said *George Hayley* struck out the figure '3, and converted it into a 2, and accordingly underwrote the said policy for the sum of two hundred pounds on the said ship : that the said *Matthew Towgood* shewed the said letter to the said defendant *Roebuck*, and all the other underwriters on the said policy, before they underwrote the same ; and the said defendant says, that the evidence aforesaid, in manner and form aforesaid, shewn by the plaintiffs to the jury, is not sufficient in law to maintain the issue within joined on the part of the said plaintiffs ; and that he, the defendant to the evidence aforesaid, hath no necessity, nor by the law of the land is obliged to answer. Wherefore he prays judgment, and that the jury may be discharged from giving any verdict upon the issue.

The plaintiffs join in demurrer.

This demurrer was argued in the Court of Exchequer, and judgment was there given in favour of the assured : and of what fell from the judges on that occasion, I have only been able to procure this account, " that judgment was given for the plaintiffs, not upon the points argued (namely, that it was essential that the ship should be sea-worthy), the Court being as to those of opinion with the underwriters ; but because the evidence did not, as the Court thought, precisely prove that the ship was not sea-worthy, at the time of the insurance taking place on the 1st of *April* 1764, on her arrival at *Nevis*, but only that she was so at the time of her sailing on the 26th of *July*." But the Court unequivocally declared, that a ship, that is not at the commencement of the insurance in fit condition to perform her voyage, is not a fit subject of insurance. Upon this judgment a writ of error was brought in the Exchequer Chamber, which was argued before Lord *Mansfield* and Lord Chief Justice *Wilmot*, who were to report their opinions thereon to the Lord Chancellor ; and the judgment of the Court below was ultimately affirmed. Whether the judgment was so affirmed upon the specific ground taken in the Court of Exchequer, or upon some difficulty arising

out of the form of proceeding (being upon a demurrer to evidence (a)), does not now appear: but whether upon the one ground, or the other, there is no doubt, though judgment was given for the plaintiffs, that the principles of insurance law upon the subject of sea-worthiness, and the doctrine of implied warranties or conditions, have always been considered as unalterably fixed and ascertained since that period, although that doctrine was not then for the first time stated in our *English* courts, and was certainly long before known in the law of insurance in other parts of *Europe*. It is unfortunate that from the circumstance of there being no printed report of this case, and from the practice of the two Chief Justices reporting their opinion in private, the grounds of that opinion cannot now be obtained: but it cannot be disputed from the opinions of Lord *Mansfield* and other judges both before that time and since, that the principles laid down in the beginning of this chapter are clearly established as the law of *England*. — That these principles were so established is manifest from the following decisions:

The plaintiff had purchased a ship, and after having her surveyed by proper judges, he sent her into the dock, and there had her fully repaired, and the ship-builder was ready to swear, that he effectually repaired her, as he thought, having done all that was required to make her a good ship; she then was taken into the government service, on which occasion she was as usual surveyed by the persons employed for the purpose. She sailed out

Lee v.
Beach,
Sittings at
Guildhall
after Mich.
Term 1762.

(a) See the case of *Cockledge v. Fanbrow*, Dougl. 119. and the case of *Gibson and Johnson v. Hunter*, in error, in the House of Lords, 2 H. Black. 187. where it appears to be decided by all the judges, that in a case of circumstantial evidence (as in the case of the *Mills Frigate*) it is not competent to the defendant to insist upon a jury being discharged from giving a verdict, by demurring to the evidence, and obliging the plaintiff to join in demurrer, without distinctly admitting upon the record, every fact and every conclusion, which the evidence given for the plaintiff tended to prove. And in the former case it is expressly said, that the demurrer to evidence admits the truth of all facts, which the jury might or could infer in favour of the party offering the evidence. Upon the form of proceeding therefore in the case of the *Mills Frigate*, and consistently with the notion entertained at the time when *Cockledge v. Fanbrow* was decided of the effect of a demurrer to evidence, as it was a case of circumstantial evidence, on which the jury might have drawn a conclusion in favour of the plaintiffs, it is possible that judgment might have been given for the plaintiffs independently of the ground taken in the Court of Exchequer, and whatever opinion the judges might entertain on the main point in the cause.

C H A P. of the *Thames*, and arrived at *Portsmouth*, but being very leaky with bad weather the Admiral ordered her to go in and undergo a survey there. This was done, and it was found on opening her, that some timbers near her keel were very bad, inasmuch that she was condemned as insufficient to proceed.

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The plaintiffs having insured her, applied to the underwriters for the loss; the defendant was one; and the plaintiff insisted he had and could prove that he had done every thing in his power to send her out sufficient and good, and that this defect was a latent cause not known to him or discovered when she was surveyed or in the dock repairing.

Lord *Mansfield* said, that it appeared that the ship had died a natural death, and received her death blow before the insurance commenced; and however innocent the plaintiff was, and however cautiously he had acted, the underwriter was equally innocent; and the implied warranty must and ought to have its effect; and the plaintiff must make the best of a bad bargain: he had the ship (defective as she was) not injured from any sea loss after the insurance was made. The plaintiff was nonsuited.

Officer v.
Cowley,
Sittings at
Guildhall
after Trin.
1765.

So also in another case where an action was brought by an innocent shipper of goods (no part owner of the ship) against the underwriter, and the policy was effected on goods in the *Amy and Letitia* at and from *Montserat* to *London*: It appeared that the ship sailed the 26th of *July*, and the next day without any bad weather she was very leaky and obliged to run for *St. Thomas's* one of the *Virgin* islands, where she was unloaded, and the goods, being much damaged, were sold. It could not but be allowed on all sides, that the ship was not sea-worthy to undertake the insured voyage; and it was agreed and admitted by defendant that the shipper of the goods was a stranger to it when the goods were shipped. The plaintiff was nonsuited, Lord *Mansfield* saying, that the implied warranty could not be dispensed with in any case; that it was a point of law, and if the plaintiff's counsel thought there was any ground to go upon he would save the point: but the plaintiff's counsel declined this, being satisfied the question was clear against them. The plaintiff was nonsuited.

That

That these principles, subsequent to the case of the *Mills Fri- gate*, were deemed to be unshaken is manifest from this, that within two years after the case of the *Mills Frigate* was decided (judgment having been given in that cause in *January 1769*) Lord *Mansfield*, in the case of the *Earl of March v. Pigot*, which came before the Court of King's Bench in the year 1771, the case of the *Mills Frigate* having been mentioned at the bar, said, "The insured ought to know whether his ship was sea-worthy or not when she set out upon the voyage insured: but how should he know the condition she might be in, after she had been out a twelvemonth (a)?"

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5 Burr.
280a.

And again his Lordship, in the case of *Eden v. Parkinson*, decided in the year 1781, confirmed the doctrine, by observing that "by an implied warranty, every ship insured must be tight, staunch, and strong: but it is sufficient if she be so at the time of her sailing. She may cease to be so in twenty-four hours after her departure, and yet the underwriter will continue liable."

Dougl. 73a.

So also in a very modern case, the law respecting the implied warranty of sea-worthiness was accurately stated, and the reason of it clearly illustrated by Mr. Justice *Lawrence*. The learned judge said, "I also doubt whether there is any analogy between a case like the present and cases where there is an implied

Chiffle v.
Secretan,
8 Term Rep.
192.

(a) In a late case, where an insurance was on the ship *Henry*, "at and from Liverpool to the coast of Africa," &c. it appeared that at the time the policy was made, the ship was not in a condition to go to sea, but was in fact at the time undergoing very material repairs; and it was contended by the underwriters that as the risk described was as well as from, if the ship was not sea-worthy, from whatever cause, when the policy was subscribed, it was void; and that any repairs done afterwards, so as to make her completely sea-worthy at the time of sailing, would not cure that defect.

Forbes and
another v.
Wilson,
Sittings after
East. Term.
1800.

Lord *Kenyon* was of opinion that, under the words *at and from*, it is sufficient if the ship be sea-worthy at the time of sailing, for from the nature of the thing, the ship, while at the place, probably must be undergoing some repair. The plaintiffs had a verdict; and no motion was made to set it aside. And, in a subsequent case*, Lord *Kenyon* held the same opinion. And in a still later case†, when the case of *Forbes v. Wilson* was quoted, Lord *Ellenborough* said, "I agree with the doctrine of that case: it is quite sufficient if the state of the ship be commensurate to her then risk. There may be a state of sea-worthiness sufficient while in harbour; and there is a state of sea-worthiness for the voyage."

* *Smith v. Surridge*,
4 Esp. 25.
See post. Sit-
tings after Mich.
Term.

† *Hibbert and others v. Martin*, Sit-
tings at
Guildhall
after Mich.
Term, 1808.

But if the insurance be on goods, ought not the ship to be sea-worthy, when the goods are beginning to be loaded, at which time the risk on goods commences?

"warranty

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" warranty of sea-worthiness. The latter is implied from the
" nature of a contract of insurance. The consideration of an
" insurance is paid in order that the owner of a ship, *which is*
" *capable* of performing her voyage, may be indemnified against
" certain contingencies; and it supposes the possibility of the
" underwriter gaining the premium: *but if the ship be incapable*
" of performing her voyage, there is no possibility of the under-
" writers gaining the premium; and if the consideration
" fail, the obligation fails. In the case of the *Mills Frigate* it
" was said that the ship's being capable of performing the voyage
" was the *substratum* of the contract of insurance. So if a ship
" fail without a sufficient crew, she is incapable of performing
" the voyage."

The doctrine thus established is by no means novel in itself, but is entirely consonant to the laws of all the maritime and commercial nations in *Europe*, as will presently be demonstrated.

The sea-worthiness of the ship being thus shewn to be an implied condition in this species of contract, it follows of course, that, in entering into the engagement, it is not necessary that there should be any previous representation of the condition of the ship; because, unless it be fit for the performance of the voyage insured, there is no binding contract; but any insufficiency of the vessel in a former voyage will not vacate the policy.

Shoolbred v.
Nutt, Sit-
tings at
Guildhall
after Hil.
1782.

Thus in an action upon a valued policy of insurance upon the ship *Two Sisters*, and a cargo of wheat and wines, from *Madeira* to *Charlestown*. The ship had sailed from *London* to *Madeira*. The plaintiff, who was owner of the cargo, ordered his broker to procure an insurance from *Madeira* for the voyage to *Charlestown*, which was accordingly done; but he did not communicate to his broker or the underwriters two letters which he had received from his captain the day before he effected the insurance, stating, that the ship had arrived at *Madeira*, but was very leaky, and that the pipes of wine had been half covered with water. But it was proved at the trial, that the leak had been completely stopped before she sailed from *Madeira*, and of course before the commencement of the risk insured. In her voyage to *Charlestown* she was taken, and the plaintiff abandoned.

Lord

Lord Mansfield told the jury, "that there should be a representation of every thing relating to the risk, which the underwriter has to run, except it be covered by a warranty. *It is a condition, or implied warranty, in every policy, that the ship is sea-worthy; and therefore there need be no representation of that. If she sailed without being so, there is no valid policy.* Here the leak was stopped before she sailed from *Madeira*, and she sailed in good condition from thence; and there is no occasion to state the condition of a ship or cargo at the end of her former voyage." There was a verdict for the plaintiff.

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And upon the authority of this case, and the reason of the thing, the Court of King's Bench declared, after time taken to deliberate upon a motion for a new trial, by Lord *Ellenborough*, Chief Justice, that an assured having impliedly warranted his ship to be sea-worthy, and having concealed no circumstance relative to the sea-worthiness, which he was required to disclose, and not having, at the time of effecting the policy, known of any fact which rendered her, with reference to the risk insured, otherwise than sea-worthy, is entitled to recover.

Haywood v.
Rogers,
4 East, 590.

Upon this principle also depends the decision of some modern cases; for if it be necessary that the ship itself should be sufficient for the voyage, it has been held to be an implied condition, that she should be furnished with every thing necessary for the purposes of safe and careful navigation. In an action upon a policy on ship and goods from *Stettin to London*, it appeared that the captain had taken a pilot on board at *Orfordness* on entering the river *Thames*, who again quitted her at *Halfway Reach*; after which, and before she had come to her moorings higher up the river, the accident happened which occasioned the loss, and in consequence of which the vessel filled with water before she had been moored twenty-four hours. But the precise time, at which the damage was sustained within those limits, or by what particular default, was not ascertained. The captain had also left the ship before the time of the actual loss. It further appeared that the pilot taken in at *Orfordness* was not properly qualified at the time according to the provisions of the 5 Geo. 2. c. 20. for the regulation of pilots on the river *Thames*, but it did not appear that this fact was known to the captain, and the pilot had since received his

Law v. Hol-
lingworth,
7 Term Rep.
100.

C H A P. regular qualifications. The plaintiff having obtained a verdict,
XI. a motion was made to set it aside; and after argument,

Lord *Kenyon* said,—“ The principle on which this case must be determined seems to be admitted on all hands, namely, *that the assured cannot recover on a policy of assurance, unless they equip the ship with every thing necessary to her navigation during the voyage; the ship herself must be sea-worthy. She must have a sufficient crew, and a captain and pilot of competent skill.* I do not feel that I am bound in this case to decide whether or not it be necessary that there should be on board the vessel a pilot qualified according to the act of parliament referred to. This case may be disposed of without deciding that question. It might be contended, though with what effect I will not say, that if the captain had taken a pilot, who represented himself duly qualified, and whom the captain believed to be so, but who in fact had not a qualification, the captain would have discharged his duty, and the underwriters would have been answerable for any loss that had happened. But in this case, the captain did not perform his duty; for he had no pilot on board at the time when the accident happened; and it is one of the things implied in contracts of this kind that there shall be some person on board the ship apparently qualified to navigate her. If the underwriters had been previously informed that there would be no pilot on board during the ship's sailing up the river *Thames*, probably they would not have undertaken the risk. On the ground, therefore, that there was *no pilot* on board when the accident happened, I am of opinion that there must be judgment of nonsuit.”

Mr. Justice *Grose*.—“ The question is not, whether the assured can recover in a case where there was a pilot on board, though not properly qualified; but, whether or not the defendant be liable for a loss, which happened to the vessel when there was no pilot of any kind on board? I think he is not, because *it is understood in all contracts of insurance that there should be such a person on board the ship.*”

Mr. Justice *Lawrence* concurring, the rule for entering a nonsuit was made absolute.

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XI.Farmer v.
Legg,
7 Term Rep.
186.

In the subsequent term, the same principle of an implied warranty that every ship insured shall be duly navigated was the rule of decision in another case, and was taken to be so well established both at the bar and on the bench, that that point was never mooted; and the only question made upon the occasion was, Whether the condition had not been performed? It was an action on a policy of insurance on the *Cadiz Dispatch*, on a voyage from *London* to the coast of *Africa*; and the principal question was, whether the ship had been navigated in the manner prescribed by the statute of 31 Geo. 3. c. 54. s. 7. (a) for if not, it was agreed that the insurance was void? The statute requires that no person shall take the command of an *African* ship until he shall have made oath, and produced to the officer of the customs a certificate attested by the respective owner or owners that he has already served in that capacity during one voyage, or as chief mate and surgeon during two voyages, &c. under certain penalties. The court were of opinion, that the certificate produced in the particular case, being signed by the then owner, did not comply with the requisitions of the statute, that therefore the ship was not duly navigated, and confirmed the judgment of nonsuit, which had passed against the plaintiff at *Guildhall*, by Lord *Kenyon's* directions.

I have alluded to the above decision, as strongly confirming the principles of law, which are the subject of the present chapter. I think it proper to mention that the difficulty which occurred in the last case from the manner in which the acts of parliament were penned, has been removed by the statute 39 Geo. 3. c. 80. s. 23. requiring expressly that the certificate shall be signed by the owner or owners of the ships or vessels in which the captain has *formerly served*. But as it had been as much the custom in the outports to receive certificates of one form as of the other, on account of the doubtful penning of the former acts, the legislature in the last mentioned statute

(a) This was one of the statutes passed on the subject for regulating the *African* slave trade; it has since been continued down by several acts from time to time; and the reference is made to this particular act, as being set out in Mr. Serjeant *Runnington's* edition of the Statutes: but the act quoted in court was 31 Geo. 3. c. 52. But the slave trade is now entirely abolished by stat. 47 Geo. 3. c. 36. See ante, p. 32. note (a).

C H A P. (f. 38.) has provided that no policies of insurance made before the statute now in recital shall be held to be void, on account of the irregular certificates given under the former statutes.

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The present Lord Chief Justice also, Lord *Ellenborough*, has had occasion to declare the law upon this very important subject, and to shew that the principle of sea-worthiness extended to the goodness of the sails and rigging, as well as to the sufficiency of the hull; and for its importance I give his Lordship's opinion at length.

Wedderburn
and others
v. Bell,
1 Campbell,
N. P. 1.

It was an insurance on goods on board the *Minorca*, "at and from *Jamaica* to *London*," at a premium of ten guineas, to return five pounds *per cent.* if the ship sailed from the place of rendezvous with convoy for the voyage and arrived. The first count of the declaration stated the loss to be, by the barratry of the master; the second, by the perils of the sea. The ship sailed for *England* with convoy in the end of *July*, and parted from the fleet on the 12th of *August*, and was never more heard of, whence she was supposed to have foundered. The defence rested on two grounds: first, that she was not properly equipped with sails; and secondly, that she had not a sufficient crew. It appeared in evidence, that the sails, which were used in stormy weather, were in good condition; but, that her maintop gallant sails and studding sails, which are useful in light breezes were extremely rotten, and almost quite unserviceable. The evidence about the state of the crew was contradictory.

Lord *Ellenborough*.—"In an action of this kind, the plaintiffs are bound to prove, not only that the ship was tight, staunch and strong, but that she was properly *equipped with sails*, and other stores: and that she was *manned* with a sufficient crew to navigate her on the voyage insured. These are conditions precedent to the policy attaching, and if they were not complied with, so that the peril was enhanced, from whatever cause this might arise, and though no fraud was intended by the assured, the underwriters have a right to say, they are not liable. The hull of the ship in this case was sufficient and sea-worthy: but it appears, that when she left *Jamaica*, her sails were highly defective

tive. It is not enough that a ship is supplied with such sails as are essential to her safety from the perils of the sea, and which might enable her, if not intercepted, from at some period or other, completing her voyage. A person, who underwrites a policy upon her has a right to expect that she shall be so equipt with sails, that she may be able to keep up with the convoy, and get to her port of destination with reasonable expedition. She must be rendered as secure as possible from capture by the enemy, as well as from the danger of winds and waves. But here the *Minorca* appears to have been deficient in sails, on which her speed might materially depend: and if so, the risk being thereby greatly increased, the policy never attached, and this action cannot be supported. His Lordship also thought, that upon the balance of evidence, the crew was insufficient. The defendant obtained a verdict.

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In the ordinances of *Lewis* the fourteenth it is declared, that decay, waste, or loss, which happens from the internal defect of the thing insured, shall not fall upon the underwriter. A commentator upon these ordinances has gone into the reason and principle of such a regulation, and has shewn the propriety of it. He sets out by observing, that this doctrine is of a date as ancient as the period when the *French* treatise called *Le Guidon* was published, which was about the year 1661, at which time, as appears by a reference to the book itself, it was considered as a settled principle, that losses, happening from causes of this nature, were not to be a charge upon the underwriter. The same author has also shewn, that such a provision is adopted in favour of the insurers by the ordinances of *Rotterdam* and *Amsterdam*. After stating these circumstances he proceeds to say, that when a ship is deemed incapable of finishing her voyage, the question whether this event is a charge upon the underwriters or not, depends upon another; namely, whether it happened by the violence of the sea, or other fortuitous circumstance, or whether the disability proceeds from age and rottenness. This will be determined by the enquiry which was made before the departure of the ship in order to judge, whether it was in a condition to perform the voyage or not: if the latter was the case, the insurers ought not to answer. In another part of this work, after laying down the same doctrine, he declares, that the indemnity

Ord. of Law.
14th, tit.
Insurance,
art. 19.
2 Val. 80.

C. 5. art. 8.

2 Mag. 90.
140—
2 Val. 81.

1 Val. 654.

A 2

will

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will be void, even though the ship has been examined before her departure, and declared capable of performing the voyage; since the event has shewn clearly, that on account of latent defects it was no longer navigable; that is, if it were proved that parts of the ship were so rotten, weakened, and destroyed, that she was not in a proper state to resist the ordinary attacks of wind and sea, inevitable in every voyage, then the underwriters are discharged. The reason is, that the examination of the ship before her departure extends only to the external parts, because she is not unripped; at least not so as to discover the interior and latent defects, for which the owner or master of the ship continues always responsible, and that with the greater justice, because they cannot be wholly ignorant of the bad state of the ship: but supposing them to be so, it is the same thing, being indispensably bound to provide a good ship, able to perform the voyage (a).

Pothier Tr.
d' Assurance
n. 66.
1 Emerigon,
p. 580.

The opinion of this learned foreigner is supported by two of his countrymen, *Pothier* and *Emerigon*.

Having thus shewn that the doctrine of sea-worthiness, as established by the decisions of our courts of justice, is confirmed by the declarations of foreign laws, and by the opinions of foreign writers; it is sufficient now to say, that where the ship is not sea-worthy, the policy of insurance is void, as well where the insurance is upon the goods to be conveyed in the ship, as when it is upon the ship itself. For whenever a cause arises with respect to damage done to goods through the insufficiency of the ship, the question, whether the master or owner is liable to make good the loss, depends upon ascertaining, whether the ship was in a condition to perform the voyage at the time of the commencement of the risk, or became defective from bad weather, and the perils of the wind and sea.

a Val. 164.

(a) Upon the doctrine of implied conditions, see *Roccus*, note 98.

CHAPTER THE TWELFTH.

Of Illegal Voyages.

WE proceed now to the consideration of another circumstance by which the contract of insurance is vacated and annulled *ab initio*: and it is this; that whenever an insurance is made on a voyage expressly prohibited by the common, statute, or maritime law of the country, the policy is of no effect. The principle, upon which such a regulation is founded, is not peculiar to this kind of contract; for it is nothing more than that which destroys all contracts whatsoever: that men can never be presumed to make an agreement forbidden by the laws; and if they should attempt such a thing, it is invalid, and will not receive the assistance of a court of justice to carry it into execution.

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The most material case upon this point is that of *Johnson and Sutton*, which came on to be argued in the year 1779, and received the solemn opinion of the court of King's Bench.

It was an action on a policy of insurance on goods, on board the ship *Venus*, "lost or not lost, at and from *London* to *New York*, warranted to depart with convoy from the Channel for the voyage." The cause was tried before Lord *Mansfield* at *Guildhall*, and a verdict was found for the plaintiff. The defendant obtained a rule to shew cause why there should not be a new trial. The facts, upon his Lordship's report, appeared to be these: the ship was cleared for *Halifax* and *New York*. She had provisions on board, which she had a licence to carry to *New York*, under a proviso in the prohibitory act of 16 Geo. 3. c. 5. But one half of the cargo, including the goods, which were the subject of this insurance, was not licensed, and was not calculated for the *Halifax* market, but for *New York*. There had been a proclamation by Sir *William Howe* to allow the entry of unlicensed goods at *New York*; and though there were bonds usually given

Johnson v.
Sutton.
Doug. 254.

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at the Custom House here, by which the captain engaged to carry the goods to *Halifax*, those bonds were afterwards cancelled, on producing a certificate from an officer appointed for that purpose at *New York*, declaring, that they were landed there. *The commander in chief had no authority under the act of parliament to issue such proclamation, or to permit the exportation of unlicensed goods.* The *Venus* was taken in her passage to *New York* by an *American* privateer. The first section of the statute prohibits all commerce with the province of *New York* (amongst others,) and confiscates all ships and their cargoes, which shall be found trading, or going to, or coming from trading with them. In section the second, there is a proviso, excepting ships laden with provisions for the use of his majesty's garrisons or fleets, or for the inhabitants of any town possessed by his majesty's troops, provided the master shall produce a licence specifying the voyage, &c. and the quantity and species of provisions; but by the same proviso, it is declared, that goods not licensed, found on board such ship, shall be forfeited. After argument, upon the motion for a new trial,

16 Geo. III.
c. 5.

See post.
p. 317.

Lord Mansfield said—"The whole of the plaintiff's case goes on an established practice, directly against an act of parliament. If the defendant did not know that the goods were unlicensed, the objection is fair as between the parties. If he did, he would not deserve to be favoured. But, however that may be, it was illegal to send the goods to *New York*, and, *in pari delicto, potior est conditio defendentis*. It is impossible to bring this within the cases cited (a), because here there was a direct contravention of the law of the land." The rule for a new trial was made absolute.

Camden v.
Anderson,
6 Term.
R. p. 723.
1101. and
Poth.
Rep. 173.

Upon this principle it was that in the cause of *Camden* and others v. *Anderson*, which was long contested in the Court of King's Bench, and afterwards upon writ of error in the Exchequer Chamber, the underwriters were held not liable, the insurance in that case being made in direct contravention of the exclusive right of trading granted to the *East India* Company by stat. 9 & 10 Wil. 3. c. 44. s. 81. and which exclusive right had

(a) These were cases of insurances on ships trading contrary to the revenue laws of foreign countries, of which more will be said hereafter.

never for one moment been suspended, nor had that statute ever ceased to be an existing law. Indeed the principle, which destroys all insurances made on ships proceeding on illegal voyages, never was contested at the bar in the argument of the above cause; but only the application of it to the particular case, on account of various statutes which had been passed and repealed, and on account of a clause in a more modern statute, which it was supposed precluded the underwriters from setting up this defence. But no man attempted to argue that that which is unlawful, and a publick wrong, could be the ground of an action.

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33 Geo. III.
c. 52. s. 150.

Soon after the above decision, a case arose in which the rights of the *East India Company*, as far as they were affected by the treaty between this country and *America*, came to be discussed in an action on a policy of insurance. By the 13th article of that treaty, which was confirmed by stat. 37 Geo. 3. c. 97. s. 22. the United States of *America* are permitted to trade to and from the *British* territories in *India*. But it was contended, notwithstanding the treaty and statute, that the insurance in question was upon an illegal voyage, being "at and from *Bourdeaux* to *Madaira* and the *East Indies*, and back to *America*," whereas the treaty meant to tolerate no other trading than a direct one between *America* and the *East Indies*; and also it was insisted, that *Butler* and *Collet*, the persons for whose benefit this insurance was effected, were not entitled to the benefit of the treaty, they being natural-born subjects of this country, but one of whom, after the ratification of *American* independance, had gone with his wife and family to reside in *America*, has ever since been domiciled there, and received as a citizen of the states of *America*; and the other of whom was resident and domiciled in *America* before the independance of that country, and has continued to be resident and domiciled there; and because their agent, the plaintiff, when he shipped the goods, and when he caused the policies to be effected, was resident in, and a subject of *Great Britain*, and knew that the ship was destined for the *British* territories in *India*. The special verdict in this case was three times argued in the King's Bench, and once in the Exchequer Chamber; and the learned judges, composing both those courts, were unanimously of opinion, that a natural-born subject of this

Wilson v. Murray, 3 Term Rep. 31. and 1 Bos. and Poll. 470. in which books the judgments in the King's Bench and Exchequer-chamber are fully and accurately given.

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country, though he cannot throw off his allegiance to the country, yet he may be a citizen of *America* for the purposes of commerce, and entitled in the latter character to all the benefits of the treaty; and that the trade allowed by the treaty between *America* and the *East Indies* need not be *direct*; it may be carried on circuitously through any country in *Europe*, including *Great Britain*. The plaintiffs had judgment. In the Court of King's Bench, Lord *Kenyon* added, that if in the commencement of one *entire* voyage, there be any thing illegal, and an insurance be effected on the latter part of the voyage, which taken by itself would be legal, such illegal commencement would have made the whole illegal, and the assured could not recover upon the policy.

Bird v.
Appleton,
8 Term Rep.
562.
+ 66 post.
p. 28.

So also in pursuance of the principle just adverted to, as falling from Lord *Kenyon*, the Court of King's Bench in a much contested case, which must be again hereafter quoted for another point, held, that if a ship was insured *AT* and from *Canton* to *Hamburg*, and during her stay at *Canton* was engaged in an illegal traffic, the assured could not recover for a loss of the ship in the course of the voyage *from Canton to Hamburg*.

But the court resisted the attempt to carry the principle any farther; for in the same case it was contended at the bar, that as the ship had been concerned in the *outward-bound* voyage in an illegal traffic, which subjected her to seizure, the insurance made on the *homeward* voyage could not be supported: and also that goods, which had been purchased with the proceeds of a *former illegal cargo*, could not be the subject of insurance. But both these points were over-ruled by the unanimous judgment of the court, after much argument and great deliberation.

From these cases much information is to be collected; for, 1st, the principle advanced at the beginning of the chapter is established, that is, that an insurance of a voyage, which is prohibited by statute, is void. They also serve to remove a distinction, which occurs in a very respectable writer. The learned *Roccus* observes, that if such an insurance, as that of which we have been speaking, should be made, *ignorante assureatore*, the insurer is discharged: from whence we are to infer, that in his
opinion,

Roccus de
Assicurat.
n. 121.

opinion, if the insurer was acquainted with the nature of the voyage, he would continue liable. But the doctrine of the Courts overturns such a distinction, because the very contract is a nullity, and a court of justice can never lend its authority to substantiate a claim, founded upon a contract which is absolutely repugnant to the known and established laws of the land. Of this opinion is *Bynkershoek*, who says, that even if it be told to the underwriter, that the voyage is illicit, he shall not be bound; because the contract is null and void, and where that is the case, the compliance with the terms of it depends upon the will of the contracting parties merely. But that which depends merely upon will is not a proper subject for a suit at law.

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Bynk.
Quest. Jur.
Pub. l. r.
c. 21. sub
fine.

If a ship, though neutral, be insured on a voyage prohibited by an embargo, laid on in time of war, by the prince of the country, in whose ports the ship happens to be, such an insurance also is void. This depends upon the power of an embargo, the right of laying on which by the sovereign of this country in time of war is undoubted; although in time of peace it may be a different question. The right being admitted, it follows of course, that any act done in contravention of a proclamation of this nature, is illegal and criminal; because it is equally binding as an act of parliament, and a contract founded on such illicit proceedings is consequently void.

1 Black.
Com. 270.
Vide ante,
103.

This was determined in a very modern case, upon a special verdict. It was an action on a policy of insurance on the *Bella Juditta*, a Venetian ship, at and from London to Grenada, with liberty to touch at Cork and Madeira to load. The defendant pleaded the general issue; and the cause came on to trial before Mr. Justice Buller, when the jury found a special verdict, the material facts in which were these: That the ship was a Venetian vessel, and the plaintiff a subject of the state of Venice; that in October 1782, the ship sailed on her voyage from London to Cork, and there took in a loading of provisions, the property of French subjects, the enemies of the king of Great Britain. That the said ship, having taken in at Cork clearances and bills of lading for Madeira, an island belonging to the king of Portugal, failed in December 1782, from Cork to that island, at which she was neither to unload any part of her cargo, nor to receive any goods on

Delmada v.
Motieuz,
B. R. Mich.
25 Geo. III.

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board, but where she took clearances and bills of lading for the island of *St. Thomas*, belonging to *Denmark*, whither she was not destined: that on her voyage from *Madeira* to *Grenada*, within 14 leagues of the latter, she was captured by an *English* man of war as prize, and carried to *St. Lucia*: that when the ship sailed from *London*, and from thence till after the capture, *Grenada* was in the possession of the *French* king. The special verdict further finds, that his majesty on the 18th day of *August* 1780, laid an embargo upon all ships and vessels laden or to be laden in the ports of the kingdom of *Ireland* with black cattle and hogs, beef, pork, butter, and cheese, or any sort of provisions. It is also found, that after the capture, a suit was commenced in the Vice Admiralty Court at *Barbadoes*, against the said ship and cargo, as belonging to the *French* king, or to some of his subjects; and the judge of that court did condemn the cargo as the property of the enemies of the king of *Great Britain*, which sentence was appealed from, and is now depending: that the judge of the said Court of Vice Admiralty was of opinion, that the said ship *Bella Juditta* was the property of *Abram Delmada* the plaintiff, and ordered that the ship should be restored; but he did not conceive the owner of the said ship to be entitled to any freight, or damages occasioned by the capture, because she was engaged in a wrong act, and the captor did no more than his duty; that the said ship was accordingly restored.

Upon this verdict, the question for the Court to decide in point of law, was, Whether the insurers upon the ship on this voyage were liable to pay for this loss of freight, and the damages occasioned by the capture?

Lord Mansfield.—“Is this voyage not a breach of the embargo? The king in time of war has an undoubted right to lay an embargo: in time of peace it is another question. Every power lays them on. If the ship had only been carrying goods of an enemy on a voyage lawful for her to perform, she might have been entitled to freight. But here the sentence says, she shall not. And why? because she has done a wrong thing. It is a fraud; for under colour of a neutral port, she goes to an enemy's port. She breaks an embargo. What the consequence of that is, has not as yet been settled: but to break an embargo is undoubtedly

doubtedly a criminal act; and wherever a man makes an illegal contract, this Court will not lend him their aid." The defendant accordingly had judgment.

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Though an insurance upon a smuggling voyage, prohibited by the revenue laws of this country, would be void under the principle above stated: yet the rule has never been supposed to extend to those cases, where ships have traded, or intend to trade, contrary to the revenue laws of foreign countries, because no country takes notice of the revenue laws of another: in such cases, therefore, the policy is good and valid; and if a loss happen, the underwriter will be answerable.

Thus in the case of *Planche* against *Fletcher*, which was stated at large in a preceding chapter, one of the objections taken to the insurance was, that there was a fraud on the underwriters, the ship having been cleared out for *Ostend*, although she was never designed to go to that place. But Lord *Mansfield* declared for himself and his brethren, that it was no fraud on the underwriters, perhaps on nobody. The reason for clearing for *Ostend*, and signing bills of lading, as from thence, did not fully appear: but it was guessed at. The *Fermiers Generaux* have the management of the taxes in *France*. As we have laid a large duty on *French* goods, the *French* may have done the same on ours, and it may be the interest of the farmers to connive at the importation of *English* commodities; and take *Ostend* duties rather than stop the trade, by exacting a tax, which amounts to a prohibition. But at any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another.

Vide ante;
c. 10. p. 261.

In another case, a short time afterwards at *Guildhall*, Lord *Mansfield*, in his charge to the jury, advanced the same doctrine which had been established by the whole Court in the preceding case.

It was an action on a policy of insurance, at and from *London* to *Pensacola* and *Manabae* in the river *Mississippi*, with liberty to touch at *Portsmouth* and *Jamaica*. The ship insured, was employed in the usual trade in the river *Mississippi*, and traded at *Little Manabae*, on the island of *New Orleans*, part of the dominion of *Spain*. *Manabae*, the place mentioned in the policy, is

Lever v.
Fletcher.
Lord. Sit.
Hil Vac.
1780.

part

C H A P. XII. part of the continent of *North America*, on that side of the river, which *France* and *Spain*, by the treaty of *Paris* in 1763, surrendered to *Great Britain*, and is about 37 leagues higher up the river than *New Orleans*. The loss happened by a seizure of the ship at *Little Mansbae* by the *Spanish* governor, as a reprisal for transgressions alleged to have been committed by a king's ship in the *Lakes*. The counsel for the defendant contended, that the policy in question was on a trading voyage, and that the trade itself was an illicit one.

Lord Mansfield.—“The first question is, Whether this policy covers the trading on the *Mississippi* before the ship's arrival at *Mansbae*? The trading at *Little Mansbae* is a delay of the voyage, and an increase of the risk. If the policy do not cover this part of the trading, then it is a deviation, and there is an end of the contract, at least, so as to prevent the plaintiff from recovering. It is very clear what the trade is. Every trading with the subjects of *Spain* is illicit by the treaty of *Paris*. The navigation is free to both countries; and the municipal laws of both countries remain. *Though such trading be contrary to the laws of Spain; yet no country pays attention to the revenue laws of another. Therefore, if the defendant had, with full knowledge that it was a smuggling trade with Spain, made the insurance, then it might be a fair contract between the parties.* But the main question for consideration seems to be, Whether this trading at *Little Mansbae* was insured by the policy?” The jury found for the defendant; and it may be presumed on the ground of deviation.

It cannot be improper, because it is nearly connected with the subject before us, to enter upon the enquiry, How far trading with an enemy in time of actual war, is legal? The opinion of foreign writers upon this point, cannot fail to afford information upon the question. It has long been settled in *France*, that all trading with enemies is illegal. This indeed is given as the reason for requiring to be inserted in the policy of insurance, the name and place of abode of the insured, the effects upon which the insurance is made, the name of the ship, and the place of loading and unloading. By complying with such a requisition, it is known in time of war, whether, notwithstanding the prohibition of commerce, which, according to these writers, a declaration of war always imports, the subjects of the king con-

tinue

Guid. c. 2.
art. 2, 3,
and 5.
2 Val. 31.

Bynk. Q.
Jur. Pub.
lib. 1. c. 3.

tinue to trade with the enemies of the state, or with their friends and allies; by which means they would be able to convey warlike stores, provisions, and other prohibited goods to the enemy. But every thing of this kind being forbidden, as prejudicial to the state, would be liable to confiscation, and to be condemned as prize, whether found in ships of our country, or of friends and allies. The prohibition to insure the property of an enemy, which is almost generally established by the ordinances of foreign countries, proceeds upon the principle, that it is unlawful to trade with an enemy; because if commerce were allowed to be carried on between the hostile nations, there could not possibly be an objection to protect that commerce by means of the contract of insurance.

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Ord. of
Stockholm,
&c. 2 Mag.
277.

The general law of *England* had not, till lately, laid down any express rule upon the subject; but we must take notice of what has passed in the courts of justice upon the question. The only ancient cases to be found in the books upon the subject are two; the one is in *Roll's Abridgment*, and happened in the 13th year of the reign of *Edward the Second*. A licence granted to certain merchants to buy and sell in *Scotland*, which was then at war with the king of *England*, was declared to be void; and consequently the trading held to be illegal. The other was a case put to the judges, in the time of Lord *Somers*, for their opinion upon the point, whether sending corn to the enemy, in time of war and famine, was a crime at the common law. The judges held it was a misdemeanour. It is to be observed, however, that the last was a case where provisions were supplied, which, as well as warlike stores, must be prohibited from the nature of the thing.

2 Roll. Abr.
173.

1 Term. Rep.
p. 85.

The first modern case, in which trading with an enemy came at all under consideration, although it did not then meet with any decision, was that of *Henkle* against the *Royal Exchange Assurance Company*, before Lord *Hardwicke* in the Court of Chancery, which upon a former occasion was cited much at length. His lordship there said; it might be going too far to say that all trading with enemies is unlawful: for that general doctrine would go a great way, even where only *English* goods are exported, and none of the enemy's imported, which might be

1 Vet. 317.

Vide ante,
C. 1.

C H A P. **XII.** **XII.** be very beneficial. He was not satisfied with the answer given to the objection of an illicit trade, by citing the case of the *South Sea Company*; for that by no means determined the question. That was not a trading contrary to the law of this country; but contrary to the agreement of the company: which is different from a contract repugnant to the general law of the country, whether statute, common, or maritime law. The same answer might be given to *Sir Robert Nightingale's* case, which was merely a plea in the Exchequer, upon the private right of the company, being contrary only to their statutes, and not to the general law of the land.

Gib. v. Ma-
son, 1 Term
Rep. 84.

From this opinion, it is evident that the question was by no means settled in Lord *Hardwicke's* mind: but in a subsequent case, Lord *Mansfield* strongly argues, that trading with an enemy is not forbidden by the general law of the country; for he says, that several acts of parliament have been *specialy* passed, in order to make such trading illegal, which proves that the legislature did not think it was so before. The ship, indeed, in the last of these cases, appeared to be neutral; and the Court laid it down, that it had no where been held that an insurance upon a neutral ship trading to an enemy's port was void. But then Lord *Mansfield* went upon the doctrine of a subject's trading with enemies, and concluded thus: by the maritime law, trading with an enemy is cause of confiscation, provided you take him in the act; but this does not extend to neutral vessels.

Potts v.
Bell, 8 Term
Rep. 548.

This question is now for ever at rest in the law of *England*, by the the decision of the court of *King's Bench*, upon a writ of error from the court of *Common Pleas*, in which it was held by Lord *Kenyon*, *Grose*, *Lawrence*, and *Le Blanc*, justices, that it was a principle of the common law, that trading with an enemy, *without the king's licence*, is illegal in *British* subjects.

In pronouncing this judgment, the Court referred generally to the principles and reasons advanced, and the long chain of authorities quoted by *Sir John Nicholl*, the king's advocate, in his most clear, and luminous argument at the bar, to which (it being impossible to do justice to it in an abridgment,) the reader is referred in the 8th vol. of the *Term Rep.* p. 554.

But

But though the king may licence such a trading generally, he may also qualify his licence, in which case the party seeking to protect himself under such licence, must exactly conform to the requisitions of it.

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Therefore, where the licence to trade was on the express condition, that bond be given in such penalty by such persons, and in such manner, as the commissioners of the customs shall direct, that the goods shall be exported to the places proposed, and to no other; and that a certificate shall be produced, within six months from the *British* consul, or other person there described, that the goods have been landed; if the bond be not given the licence is void, the voyage illegal, and cannot be insured.

Vandycck v White-more, East's Rep. 475

A similar decision had been made in *Vanbartsals v Halhead*, *Mic. 31 Geo. 3.* on the stat. of 16 *Geo. 3.* ch. 5. on which the case of *Johnson v. Sutton*, *ante*, page 307. had been decided.

2 East's Rep. p. 487. note (c).

The king's prerogative, of licensing the trading with an enemy, under such restrictions as he shall be pleased to direct, being thus established, and it being also settled that the party, to entitle himself to the benefit, must conform to the stipulations of the licence, still the courts of justice will permit every thing to be done, though not expressed, which is necessary in order to effectuate the intention of his Majesty in granting the licence, *ut res magis valeat, quam pereat*. Thus in a case lately decided in the Court of King's Bench, upon a bill of Exceptions tendered to Lord Chief Justice Mansfield at *Nisi Prius*, in the court of C. P., the following facts appeared in evidence, and which are all that are material for the discussion of this point. The plaintiffs in the court below brought their action against Mr. *Kensington*, an underwriter, on a policy dated *Feb. 1800*, at and from the *Havannah* and *Matanzas*, or any other port or ports in *Cuba*, to *Nassau*, *New Providence*, upon goods, and also upon ship or ships sailing between two given periods of time. The declaration averred that *Kensington* subscribed the policy for 500*l.* on goods and specie, and that by a subsequent memorandum, it was agreed that the value of any vessel or vessels that should carry the goods insured should be included in that insurance: and that Robert

Kensington v. Inglis, in Error, 8 East's Rep. 273.

Real,

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Read, for whose benefit the insurance on the goods and specie was made, was interested in such goods and specie, and that one *Juan Villas*, for whose benefit the insurance on the ship *Heſtor* was made, was interested therein. The second count of the declaration averred that the ship *Heſtor*, on board which the goods and specie were loaded, did not belong to his Majesty, or any of his subjects.

The bill of Exceptions, amongst the other necessary facts not material here, stated that *Inglis* and Co. effected the policy, and that a certain cargo of goods and specie belonging to *Robert Read* had been shipped at the *Havannah* on his account, being part of the property insured, on board the *Heſtor*, and that the policy was made in respect of the said goods and specie for his benefit, and in respect of the said ship for the benefit of the said *Juan Villas*, and that *Juan Villas* was a Spaniard by birth, then and still residing in the dominions of, and adhering to, the king of Spain, between whom and the king of Great Britain there existed an open war, as well at the time of effecting the policy, as also at the time of trial; but that the action was commenced in time of peace. The loss of the ship by perils of the sea is then stated between the *Havannah*, a colony of the king of Spain, and *Nassau*, a colony of our king. The bill of Exceptions further stated, as applicable to this point, his Majesty's Instructions to General *Dowdeswell*, Governor of the *Bahama Islands* (*New Providence* being one) authorizing him to grant licences for the importation into those islands of specie, and such goods as were loaded on board the *Heſtor*, in any British or Spanish vessel of a certain built (within which the ship *Heſtor* might be classed) from any Spanish colony in America, notwithstanding the then existing hostilities: and the commanders of his Majesty's ships, and also privateers, were enjoined not to detain or molest any vessel trading between the ports therein specified, conformably to the said regulations, and having a licence for that purpose. It further appeared that a licence was granted by the governor to *Robert Read* for the *Heſtor* for the voyage out and home, and was not limited in point of time, and was to enable the *Heſtor* to bring the goods therein enumerated from the Spanish settlement to *New Providence*: that by the laws of Spain vessels coming from a Spanish settlement, in time of war, cannot clear for a British port, but it

is the practice to clear for a *Spanish* or neutral settlement : that the witness (who was the governor's secretary) knew the *Hector* to be a *Spanish vessel*, and the property of a *Spaniard*, and she was so described in the licence. Upon this point, the counsel for the underwriter, *Kensington*, objected at the trial, that although the voyage and trade were licenced, the plaintiffs *Inglis* and Co. could not enforce a policy for the benefit of *Juan Villas*, so being *such alien enemy* as aforesaid. But the Chief Justice *Mansfield* was of opinion, that a ship belonging to an alien might, *when so licenced*, be lawfully insured by a *British subject*; and that the policy so effected might be enforced by such *British subject* in a court of law, for the benefit of such alien owner. This opinion was excepted to; and after argument upon the bill of Exceptions, in which it was contended, that the licence only protects the goods, but does not give to an alien enemy the right to sue either in his own name, or in the name of his trustee; the Court took time to deliberate; and now

Lord *Ellenborough* delivered the unanimous judgment of the Court. As to the second question, whether the plaintiffs upon this record, who are *British subjects*, duly competent to sue in their own persons, can in a court of law enforce by suit a policy for the benefit of another person, who was an alien enemy when the policy was effected, was so at the trial, and still is so; the negative is strongly contended for on behalf of the underwriter, on the authority of the cases of *Brisfow v. Towers*, 6 Term R. 35 and *Brandon v. Nesbitt*, *ibid.* 23. But it will be recollected that in those cases the party interested, and on whose behalf the suit was maintained, was an alien enemy, against whose recovery, through the medium of his *British* trustee there existed this objection, that the property to be covered by the policy belonged to an alien enemy, and that any protection afforded to such property, by means of a contract of indemnity, directly and materially contravened the public interest, which was concerned in the precariousness or destruction of such property. In the present instance no such public policy of the country is contravened by sustaining and giving effect to such a trust; but on the contrary, this country, in furtherance of the same policy, which allows the granting of licences to authorize the trade, ought to give effect to the ordinary means of indemnity, by which that trade (from the continuance

The 1st Question was upon a point of Evidence. The third point is referred to in Ch. 1. p. 38.

See these Cases, post. p. 320.

C. H. A. P. XII. { tinuance of which the public must be supposed to derive a benefit) might be best promoted and secured. And although the King's licence cannot, in point of law, have the effect of removing the personal disability of the trader, in respect of suit, so as to enable him to sue in his own name; it purges the trust, in respect to him, of all those injurious qualities in regard to the public interest, which constituted the public ground of objection to the trust in the two cases just referred to, and which have been so much relied upon on the part of the plaintiff in error. As therefore there is in this case no legal incompetence to sue in the parties actually suing, and no public interest which stands in the way of maintaining this suit, for the benefit of those who were the objects of the licence authorizing the trade in question, it does not appear to us that the right of the assured to recover can well be resisted on that ground.

The next question which comes to be considered is, Whether it be lawful to insure the property of an enemy, when not protected by a licence? Whatever doubts might formerly obtain in *England* either as to the legality or expediency of such insurances, the question is now finally settled in the negative by two unanimous decisions of the court of King's Bench (a).

R. Brandon
v. Nesbitt,
6 Term.
Rep. 23.

The first of those cases was an action on a policy of insurance on goods on board the *Greyhound*, an *American* ship, at and from *London* to *Bayonne*; there was an averment in the declaration, that the policy was effected for the benefit, and on the account, of *David Brandon, Isaac* and *David Valery*, and others who were interested in the goods; and another averment that the ship was captured as prize. The defendant pleaded that the persons, in whom the interest was averred to be, were aliens born; and that, before the ship sailed, they were become alien enemies of our king.

(a) Lord Alvanley, in delivering the judgment in *Furtado v. Rogers*. 3 Bos. and Pull. 391. supposed that these cases were decided upon the ground, of *alienage* only. Without presuming to question his Lordship's opinion, it was become immaterial, for in that very case, the opinion of C. B. is declared to be that such insurances were illegal by the common law; and all the other cases have proceeded on that principle.

The second plea stated, that the persons interested were living in *France*, and enemies, and that the goods were sent from *London* after the commencement of the war, for the purpose of being landed and delivered in *France* to the king's enemies (*a*). The replication to the first plea stated, that the persons interested were indebted to the present plaintiff in more than the value of the goods insured. The replication to the second, that the goods insured were not prohibited at the time of the policy, and that they were shipped before the commencement of the war. To these replications there were demurrers.

Lord *Kenyon*, in giving the opinion of the court, said, that they had considered this case, and unless any thing more could be urged at the bar to shake the opinion they had formed, they were of opinion, that judgment must be given for the defendant, on this ground, that an action will not lie either by or in favour of an alien enemy (*b*).

This case, at first view, may appear to proceed merely upon the special plea; but in the same term another case was argued upon a special verdict, in which the only point discussed was the legality of insurances on enemy's property; and the principle of the decision in *Brandon v. Nesbitt* was held so clearly to controul the other, that, on the authority of that decision, the counsel for the plaintiff abandoned the second argument, which the court had ordered.

Bristow v. Towers,
6 Term
Rep. 35.

The special verdict stated, that the plaintiff, on the 13th *March* 1793, being then resident in *Great Britain*, in pursuance of an

(*a*) In a plea of alien enemy, the defendant must state that the plaintiff was born in a foreign country at enmity with this country, and that he is not residing here under letters of safe conduct from the king. *Casseres v. Bell*, 3 Term Rep. 166.

(*b*) By an act of parliament, which passed in the last war, "for more effectually preserving money or effects, in the hands of his majesty's subjects, belonging to, or disposable by, persons resident in *France*, for the benefit of the individual owners thereof," commissioners were to be appointed for carrying the purposes of the act into effect: and by the 17th sect. of the statute, the commissioners were empowered to direct the money due on certain insurances to be paid; and, in case of refusal, actions might be brought with the approbation of the commissioners; and to such actions so brought under this authority, *alien enemy* is not pleadable. But I believe no such commissioners ever were appointed.

34 Geo. III.
c. 79. s. 17.

order

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order for that purpose, caused the insurance in question to be made on account of *Arruet, Massot, &c.* and that the goods insured were by the policy warranted *French* property, and were so in fact; that the goods, which consisted of buttons, buckles, &c. of the manufacture of this kingdom, were shipped on board the *Nancy* (an *American* ship), on the 19th March 1793, by Messrs. *Humphreys* of *Birmingham*, in compliance with orders received in January 1793, from Messrs. *Arruet, Massot, &c.* who were and still are subjects of *France*: that by two orders in council of 11th February 1793, general reprisals were granted against the ships, goods, and subjects of *France*; and a general embargo was laid on all vessels in *Great Britain*: but by another order of 26th February the said general embargo was declared not to extend to foreign vessels belonging to the subjects of any state in amity with his Majesty, but that they might forthwith proceed on their respective voyages, provided the cargo did not consist of naval or military stores, or any other article, the exportation whereof was prohibited by any law or order of council then in force. The verdict then states the sailing of the ship on the voyage insured on the 21st March 1793, the subsequent capture of the vessel by some *English* subjects, and the condemnation of the goods insured as *French* property.

This special verdict was fully argued at the Bar, and a second argument was ordered: but after the decision of *Brandon v. Nesbitt*, the counsel for the plaintiff said, that he declined the further argument of the case, as he had no hopes of convincing the court that this case could be distinguished from the principle on which the former had been so recently determined.

Lord *Kenyon*.—"It appears to the court in the same light, and there must be judgment for the defendant."

This important case has decided that the insurances of enemy's property are generally unlawful: but as the learned judges had not an opportunity of entering into the reasons of their judgment, it cannot be impertinent in a work, which professes to be a system of the law of marine insurances, to give a summary of the arguments on both sides of a question, which has been once or twice discussed in parliament, upon which very eminent men

men have entertained different opinions, although till lately it has never come fully and precisely in judgment in a court of common law. C H A P.
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Those who argue in favour of such insurances insist, that it would be of very dangerous consequences by a prohibition of the nature alluded to, to strip ourselves of a branch of trade, which we now enjoy almost without a rival, as more of this business is done in *England* than in all the rest of *Europe*. That not only the nations, with whom we are at peace, but even those with whom we are at war, transact all this business in *London*; that the advantage thence derived to the kingdom is obvious, for premiums produce a great balance in our favour, and where there is no capture, the trade of the enemy pays a tax to this country for its safety. On this ground, it has been also urged as a fact, that important intelligence has, by means of such insurances, been frequently obtained of the enemy's designs; and that in several wars, some of the richest prizes have fallen into our hands by information communicated by those employed to procure insurances upon them. With respect to the legality of such contracts, they contend, it never has been disputed, that they had been effected in all former wars without interruption, except when prohibited for about six months by the statute 21 *Geo. II. ch. 4.* and had not only been effected, but recovered upon in courts of justice, the objection of enemy's property never having been made. That the opinion of Lord *Hardwick*, as delivered in *Henkle v. Royal Exchange Assurance*, and that of Lord *Mansfield*, frequently declared in parliament, and on the bench, was strongly in favour of such insurances. That the latter of these two illustrious judges, almost the last time he sat in court, adhered to that opinion; for in the course of his direction to a jury delivered so lately as 1786, he said, "It is for the benefit of this country to permit these contracts upon two accounts: the one, because you hold the box, and are sure of getting the premiums at least as a certain profit; the other, because it is a certain mode of obtaining intelligence of the enemy's designs, and I have known instances of intelligence procured by such methods." That the statutes, passed in the 21st *Geo. II.* and in the 33d of the present reign, to prohibit such insurances.

1 Vol. 920.

Gist v. Mason, 1 Term Rep. 84. and MS. note of same case.

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33 Geo. III.
c. 27. l. 4.

prove, by being partial in their operation, and limited in their duration, that in the opinion of the legislature these contracts were not prohibited by the general law of the land. Indeed, trading with an enemy does not itself seem to be contrary to law. For although some foreign writers condemn it, they do not advert to the method of carrying it on by the medium of neutral nations. Declaration of war does not necessarily import a prohibition of commerce; and wherever it may be conducted beneficially to a belligerent power, it is, as far as respects such power, perfectly justifiable. Even the writers on the law of nations enumerate instances of commerce being carried on between belligerent powers, by express stipulation, which is sufficient to shew that all commerce, by a declaration of war, is not of necessity interdicted. That this has been the opinion in *England*, the practice of the legislature in all former wars strongly proves, for they have passed statutes adapted to the exigence of the times, considering the subject in a light merely political; some of them imposing a general prohibition, though the restraint was frequently afterwards in part taken off; some which in the first instance imposed a partial restraint only; and some, which actually sanctioned a trade with an enemy, which in time of peace was illegal: the two first classes would have been wholly nugatory, if the doctrine, that insurances of this nature, were illegal, had ever prevailed. Such statutes have been passed in every war from the reign of *Charles* the Second to the present time; which prove demonstrably, that parliament conceived a legislative prohibition was necessary to make the trading illegal, otherwise all or most of the acts alluded to would have been unnecessary and superfluous.

Dynk.
Quæst. Juris.
Pub. lib. 1.
c. 3.

On the other hand it is contended by those who hold the insurance of enemy's property to be illegal and impolitic, that by the declaration of war, all commerce immediately and necessarily becomes prohibited between hostile nations; and if so, it follows that insurances must also be forbidden; for it cannot be lawful to do that indirectly, which is not permitted to be done directly. Instances of trading with enemies to be found in writers on general law, by express stipulation, only shew that governments occasionally make exceptions from the general rule to suit their own convenience; and to this source all the special statutes alluded to

to are referable; some of which too contain regulations of particular branches of commerce. Even where they extend to general prohibitions of trade with an enemy, it is for the purpose of superadding special penalties for checking bold offenders, who are not to be deterred by the ordinary prohibitions of the law, an observation which fully applies to the statute of 21 Geo. II. and to the Traitorous Correspondence bill lately passed. But all the writers upon insurance concur in the illegality of such contracts. The author of *Le Guidon*, a work of great repute, published by Monf. Clerac about the middle of the 17th century, is explicit upon the point; and the editor of the work observes, that this opinion is conformable to the ordinances of *Barcelona*, which passed so long ago as 1484. *Valin*, in his commentary, concurs in declaring the same law, and relates that by the *English* insuring *French* property in the then last war, one part of the nation rendered back to *France*, what had been taken by the other *jure belli*. *Bynkershoek*, to whose writings mankind are much indebted, dedicates a whole chapter of his work to this subject, and argues strongly both against the legality and expediency of such contracts. In the only two cases, in which the legality of trading with an enemy came in question in *England* (see *ante*, p. 320.), it was held to be illegal. Even the expediency of such contracts is greatly to be doubted. The *English* insurers, who deal at a cheaper rate, and fulfil their engagements more punctually than those of other nations, will, in time of peace, easily regain such branches of that trade, as, by a prohibition during war, may be diverted into other channels. With regard to the supposed profit, that must ever be a matter of great uncertainty, for the premiums are not clear profit. In cases of capture, there is no loss to the enemy, and no gain to us: in losses by perils of the sea, we bear the whole burthen, and there is actual gain to them, deducting indeed the premium in both cases. In a national point of view, the detriment derived to us from the support afforded to the commercial resources of our enemies is beyond all computation. Our insurers too are by this traffick rendered bad subjects of the country, by being interested against the success of our own cruizers, in favour of the enemy's escape. The argument of procuring intelligence of the enemy's plans by these means is fallacious in the highest degree; for it never can be supposed, that underwriters would be the means of betraying the ships insured into the power of our cruizers, by which they

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Le Guidon,
c. 2. l. 5.

Valin, liv. 1.
tit. 6. art. 3.

Bynk. Q.
Jur. Pub.
lib. 1. c. 21.

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would be the greatest sufferers ; on the other hand, the temptation must be very strong to them to afford such intelligence to the enemy of the sailing of our armed vessels, as may put them on their guard, and prevent them from falling into our hands. That such intelligence had been given to the enemy was asserted as a fact in the debates in parliament in 1747 ; and the general law of the land will not tolerate a contract, which may lead the subject into so strong a temptation to betray his duty. Even the opinions most favourable to this species of contract have never gone further than to contend, that insurances upon enemy's property from a friendly or neutral port, or from one hostile country to another, were legal ; but till the late cases of *Brandon v. Nesbitt* and *Brislow v. Towers*, it never was attempted to be argued, that an insurance could legally be made on enemy's property, sailing directly from this country to that of the enemy. Such is the sum of the argument on both sides of this great question, which is probably now finally closed.

Furtado v. Rogers,
9 Bos. &
Pul. 191.

Kellner v. Le Mesurier,
4 East's R.
396.

The Courts, in order to prevent effectually all insurances upon enemy's property, have decided, that a policy on a foreign ship must be understood as virtually containing an exception of all captures made by the authority of our own government. A policy containing an insurance against *British capture, eo nomine*, would be illegal, and void upon the face of it, as being directly and obviously repugnant to the interests of the state, having an immediate tendency to render ineffectual, to the extent of the indemnity created thereby, all offensive operations by sea, adopted on the part of his majesty and his subjects, for the purpose of weakening the strength, and diminishing the resources of the enemy. And if so, an insurance *indirectly* producing that effect, by the application afterwards of the *general* terms of the insurance to the *particular* event, that is, of *British capture*, must, upon principle, be equally illegal : and no peril, the subject of insurance, can be covered under the generality of the terms "*capture, detention of princes*," or the like, which could not, consistently with law, be specifically insured against in direct and express terms. The Court extended the same principle to a case where the insurance was made on *French* property by a *British* underwriter in time of peace, and where the action was not brought till peace was again restored ; but the capture was made by his majesty's ship during hostilities between this country and *France*.

Gamba v. Le Mesurier,
4 East 407.

And in furtherance of the same principle, an insurance on goods on a voyage from *London to Bayonne in France*, shipped on board a neutral ship, on account and at the risk of *Frenchmen before*, but exported *after*, the declaration of hostilities between *Great Britain and France*, cannot be enforced against the underwriter, even after the restoration of peace, to recover a loss by capture of a *co-belligerent* (though not stated to be an ally) of *Great Britain during the war*. For the Chief Justice (Lord ELLENBOROUGH) expressly said, in delivering the judgment of the Court, where an insurance is upon goods *generally*, a proviso to this effect shall, in all cases, be considered as engrafted therein, namely, “*provided that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assurer and assured.*” Because during the existence of such hostilities the subjects of the one country cannot allowably lend their assistance to protect by insurance the property and commerce of the subjects of the other. And in like manner, and upon similar principles of public policy, the risk of *detention of princes, &c.* must be understood to be retained and qualified by an implied proviso, “*that it shall not extend to cover any loss happening in the course of any contraband adventure, in which the goods would become liable to seizure as forfeited by the laws of this country.*”

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Brandon v.
Curling,
4 East 410.

But afterwards when it was insisted upon at the bar, that the express insertion of such memorandum, *insuring against British capture, seizure and detention*, rendered the policy void, although it was made to cover a *British* risk, the Court did not decide the point, it not being necessary so to do: but the judges were inclined to the opinion, that the memorandum would not vitiate the policy; and that the doctrine of *Kellner v. Le Mesurier* and of *Gamba v. Le Mesurier* must be taken with reference to the cases before the Court, they being insurances on *foreign ships*. Of this opinion too Lord *Alvanley* appears to have been in *Touteng v. Hubbard*, quoted in the Chapter on Capture and Detention of Princes, *ante*, p. 109. note (a); and see there also a reference to Lord *Ellenborough's* opinion in *Page v. Thompson*, and *Vijger v. Prescott*. In a subsequent case Lord *Ellenborough* was of opinion that though a neutral subject was resident in a place occupied by an enemy, an insurance on his goods to a neutral or friendly

Lubbock v.
Potts, 7 East,
449.

Bromley v.
Heseltine,
1 Campbell,
N. P. Cas.
p. 75.

C H A P. friendly port, was valid. The plaintiff had a verdict, and the
XII. case never was carried further.

Barker v.
Blakes,
9 East, 283.
See this case
for other
points, ante,
ch. 9.

So also the Court of King's Bench lately held, that it was no breach of neutrality for a neutral ship to carry enemy's property from its own to the enemy's country, the voyage and commerce not being of a hostile description, nor otherwise expressly or impliedly forbidden by the law or policy of this country, though the neutral thereby subject his ship to be detained and carried into a *British* port for the purpose of search. Therefore the defendant, a *British* underwriter, after the condemnation of the enemy's goods, and the liberation of the rest, was held liable to the neutral owner of goods insured in the same ship whose voyage was so interrupted, either as for a total loss, if notice of abandonment upon the loss of the voyage be given in due time; or for an average loss, if such notice be given out of time.

There is one species of insurance which never could be made upon the ships or goods of an enemy, or even of a subject, and that is upon a voyage to a besieged fort or garrison, with a view of carrying assistance to them: or upon ammunition, other war-like stores, or provisions; because, from the nature of these commodities, they are absolutely prohibited by the laws of all nations.

Having thus disposed of these two important questions, it will be proper to conclude, by stating what the principle is, which is laid down in this chapter, and supported by authority. All insurances upon a voyage generally prohibited by law, such as to an enemy's garrison, or upon a voyage directly contrary to an express act of parliament, or to royal proclamation in time of war, are absolutely null and void.

CHAPTER THE THIRTEENTH.

Of Prohibited Goods.

THE subject of the present chapter is materially connected with that of the foregoing ; and indeed follows as a consequence from the doctrine there advanced. We then saw that a contract founded upon that which was contrary to law, could never be carried into effect. Thus by the laws of almost all countries, the exportation and importation of certain commodities are declared to be illegal : to act contrary to that prohibition, is clearly a contempt of legal authority ; and consequently a moral wrong. If the act itself be illegal, the insurance to protect such an act must also be contrary to law : and therefore void. Agreeably to this principle, it seems to have been laid down by the writers upon the subject, as a general and universal proposition, that an insurance being made, although in general terms, does not comprehend prohibited goods ; and therefore when the insured shall procure such commodities to be shipped, *the underwriter being ignorant of it*, by means of which the ship and cargo are confiscated, the insurer is discharged. In this passage from *Roccus* it may be inferred, that if the underwriter *knew* that the goods were prohibited, the insurance would be valid. But we trust, it was sufficiently shewn in the preceding chapter, that that will not alter the case : because no consent or agreement can render a contract good and valid, which, upon the face of it, is contrary to law. In *France* this rule was adopted so long ago as the year 1660 : for in the work of a very respectable writer of that age we find this passage : *assurances se peuvent faire sur toute sorte de marchandize, pourvu que le transport ne soit pas prohibé par les edicts et ordonnances du roy*. And from an authority no less respectable, it appears that the law of *France* has undergone no alteration since that period ; for, he says, “ that those effects, “ the importation or exportation of which is prohibited in “ *France*, cannot be the subject matter of the contract of insurance ; and if they should be confiscated, the insurers are not “ responsible, even where the truth has been declared by a special “ clause

C H A P.
XIII.Ld. Kaime's
Prin. of Eq.
66.Roccus de
Assicur.
No. 21.Le Guidon
c. 2. art. 2.Emerigon
Traité des
Assurances,
tom. 1. c. 8.
f. 5.

C H A P. " *clause in the policy.* The assurance is void, and no premium
 XIII. " is due." This passage from the celebrated work just referred to,
 confirms the idea above started, with respect to the knowledge of
 the underwriter.

Molay,
 lib. 2. c. 7.
 f. 15.

The law of *England*, whose commercial regulations have surpassed those of every other nation in the world, has also introduced such a rule into its system of mercantile jurisprudence: and the oldest writers upon the subject have taken notice of it. It is said, "if prohibited goods are laden aboard, and the merchant insures upon the general policy, it is a question whether if such goods be lawfully seized as prohibited goods, the insurers ought to answer. It is conceived they ought not: for if the goods are at the time of the lading unlawful, and the lader knew of the same, such assurance will not oblige the insurer to answer the loss; for the same is not such an assurance as the law supports, but a fraudulent one."

4 & 5 W.
 & M. c. 15.
 f. 14, 15, 16.
 500*l.* penalty
 on persons
 insuring to
 import prohibited
 goods.

But it is not upon the opinions of learned men merely, that this doctrine is founded in the *English* law; for the legislature have by positive statutes declared their ideas upon the subject. It appears from the preamble to that section of the statute about to be quoted, that a custom, highly prejudicial to the revenue of the country, had prevailed, and was encreasing to a very alarming degree, of importing great quantities of goods from foreign states in a fraudulent and clandestine manner, without paying the customs and duties payable to the crown: and that this evil had been encouraged and promoted by some ill designing men, who, in defiance of the laws, had undertaken as insurers, or otherwise, to deliver such goods so clandestinely imported, at their charge and hazard, into the houses, warehouses, or possession, of the owners of such goods. In order to remedy this mischief, it was enacted, "that all and every person and persons, who, by way of insurance or otherwise, should undertake or agree to deliver any goods, wares, or merchandizes whatsoever, to be imported from parts beyond the seas, at any port or place whatsoever within this kingdom of *England* dominion of *Wales*, or town of *Berwick upon Tweed*, without paying the duties and customs that should be due and payable for the same at such importation, or any prohibited goods whatsoever; or in pursuance of such insurance, undertaking, or agreement,

" agreement, should deliver, or cause or procure to be delivered, C H A P.
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 " any prohibited goods, or should deliver, or cause or procure
 " to be delivered, any goods or merchandizes whatsoever, with-
 " out paying such duties and customs as aforesaid, knowing
 " thereof, and all and every their aiders, abettors, and assist-
 " ants, should for every such offence forfeit and lose the sum of
 " *five hundred pounds*, over and above all other forfeitures and
 " penalties, to which they are liable by any act already in force."
 It is also enacted, " that all and every person and persons,
 " who should agree to pay any sum or sums of money for the Sect. 15.
Like penalty
on the in-
sured.
 " insuring or conveying any goods or merchandizes that should
 " be so imported, without paying the customs and duties due
 " and payable at the importation thereof, or of any prohibited
 " goods whatsoever, or should receive or take such prohibited
 " goods into his or their house or warehouse, or other place on
 " land, or such other goods before such customs or duties were
 " paid, knowing thereof, should also for every such offence for-
 " feit and lose the like sum of five hundred pounds; the one
 " half of the said forfeitures to be to their majesties, and the
 " other half to the informer, or to such persons as should sue
 " for the same. And if the insurer, conveyor, or manager of
 " such fraud should be the discoverer of the same, he should
 " not only keep the insurance money or reward given him, and
 " be discharged of the penalties to which he was liable by reason
 " of such offence, but should also have to his own use one half
 " of the forfeitures hereby imposed upon the party or parties
 " making such insurance or agreement, or receiving the goods as
 " aforesaid: and in case no discovery should be made by the
 " insurer, conveyor, or manager as aforesaid, and the party or
 " parties insured or concerned in such agreement should make
 " discovery thereof, he should recover and receive back such in-
 " surance money or premium as he had paid upon such insurance
 " or agreement, and should have to his own use one moiety of
 " the forfeitures imposed upon such insurer, conveyor, or ma-
 " nager as aforesaid, and should also be discharged of the for-
 " feitures hereby imposed upon him or them."

A few years afterwards, lustrings, the manufacture of which
 till then was little known in *England*, having been worked to
 great perfection by the Royal Lustring Company, the legislature
 found it necessary to protect this branch of trade, by prohibiting
 the

C H A P. XIII. the importation of such filks from foreign countries into this, without paying the duties, whether by direct means, or by the way of insurance. It was enacted, "that every person, who
 8 & 9 W. 3. "should import any foreign alamodes or lustrings from parts
 c. 36. l. 1. "beyond the seas, into any port or place within the kingdom of
 "England, dominion of Wales, &c. without paying the rates,
 "customs, impositions, and duties, that should be due and
 "payable for the same at such importation, or should import
 "any alamodes or lustrings, prohibited by law to be imported,
 "or should, by way of insurance or otherwise, undertake or
 "agree to deliver, or in pursuance of any undertaking, agree-
 "ment, or insurance, should deliver, or cause to be delivered,
 "any such goods or merchandize, and every person who should
 "agree to pay any sum or sums of money, premium, or reward
 "for insuring or conveying any such goods or merchandize, or
 "should knowingly take or receive the same into his, her, or
 "their house, shop, or warehouse, custody or possession, such
 "person or persons should and might be prosecuted for any of
 "the offences or matters aforesaid, in any action, suit, or infor-
 "mation."

Sec. 2. The second section of this statute enables persons to sue for the penalties imposed by the former act of *William and Mary* by action of debt, bill, plaint, or information, in any of his majesty's courts of record of *Westminster*.

Wool being the staple manufacture of this kingdom, it was
 Mir. c. 1. f. 3. always deemed a heinous offence to transport it out of the realm:
 11 Ed. 3. c. 1. for we find it was forbidden at the common law; and afterwards
 8 Eliz. c. 3. more expressly in the reign of *Edward* the Third, since which
 12 Car. 2. c. 32. period this branch of trade has been much attended to, and any
 7 & 8 W. 3. c. 28. offences against it have met with corporal and pecuniary punish-
 4 G. 2. c. 17. ments by several subsequent statutes. This being the case, an
 insurance upon wool so to be exported must have been void;
 because the very foundation of the contract was contrary to law.
 But notwithstanding these restrictions, the practice of exporting
 wool became so frequent, as well as the practice of insuring such
 cargoes, and undertaking to deliver them safely abroad, that it
 became necessary for the legislature to interpose, and by a new
 declaration of the law, and the imposition of a heavy penalty,
 to endeavour to check the growing evil. Accordingly it was en-
 acted,

12 Geo. II.
 c. 21. l. 29.

acted, "that every person, who by way of insurance or otherwise, should undertake or agree, that any wool, wool-fells, wool flocks, mortlings, shortlings, worsted, &c. should be carried or conveyed to any parts beyond the seas from any port or place whatsoever within this kingdom or *Ireland*: or in pursuance of such insurance, undertaking, or agreement, should deliver, or cause to be delivered, any of the said goods in parts beyond the seas, such person, and all and every his aiders, &c. should for every such offence forfeit and lose the sum of five hundred pounds." The next section inflicts a like penalty on the insured: and the following one, in order to encourage the parties to disclose such contracts, releases the party informing from all the penalties, to which he himself was subject, and also gives him the whole of the forfeiture, after deducting the charges of the prosecution.

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500*l.* penalty on the insurer who insures or procures wool to be landed in foreign parts, Sect. 30.
Sect. 31.

But in order wholly to prevent this illicit exportation of wool, it was necessary for the legislature to go one step further: because as policies are frequently made on goods, as well as on ships, in which the insurer undertakes, in consideration of the premium, to bear all the risks and hazards of the voyage; and as it is generally unknown to the insurers what sorts of goods are loaded on board any ship or vessel, it happened that insurances were made on wool or woollen yarn to be carried from *Great Britain* or *Ireland* to foreign ports, or on woollen manufactures to be carried from *Ireland*. Therefore it was declared, "that all policies of insurance, which should be made on goods and merchandizes, loaden or to be loaden, on any ship or vessel bound from *Great Britain* or *Ireland* to foreign parts beyond the seas, which should afterwards appear to be wool or woollen yarn, or any other species of wool, or woollen manufactures from *Ireland*; and all policies of insurance which should be made on any ship or vessel bound from *Great Britain* or *Ireland* to foreign parts beyond the seas, which should have on board any wool or woollen yarn, or any other species of wool or woollen manufactures from *Ireland*, should be deemed and taken to be null and void, notwithstanding any words or agreement whatsoever, which should be inserted in any such policy of insurance; and nothing should be recovered by the assured in either case for loss or damage, or for the premium which

Same act, s. 33.
Insurances on woollen goods void.

C H A P. XIII. " which should have been given as the consideration for insuring
 " such goods and merchandizes, ship or vessel."

This latter act, as far as relates to *Ireland*, has been repealed by a subsequent statute of 20 *Geo.* 3. c. 6.

28 *Geo.* III. c. 38. In a late session of parliament an act passed for reducing all the laws relative to the exportation of wool into one statute; and for the first offence of that sort inflicts a penalty of 50*l.* with six months' solitary imprisonment for exporting wool, &c. The

Sect. 45. 45th section of that statute declares that, " every person or persons who, by way of insurance or otherwise, shall undertake or agree that any sheep, wool, or any other of the enumerated articles in the statute, shall be carried or conveyed to any parts beyond the seas, from any port or place whatsoever within this kingdom, or in pursuance of such undertaking or agreement, shall deliver, or cause or procure to be delivered, any sheep, wool, &c. in parts beyond the seas, such person or persons, their aiders and abettors, shall upon conviction be liable to the same punishment as the exporters."

Sect. 46. The next section inflicts a like penalty upon the persons paying for such insurance.

Sect. 48. But as insurances are frequently made on goods, the insurer not knowing what the goods are, it is declared that " all policies of insurance which shall be made on goods and merchandizes, laden or to be laden on any ship or vessel bound from *Great Britain* to foreign parts, which shall afterwards appear to be wool, woollen, or worsted yarn, &c. shall be deemed and taken to be null and void, notwithstanding any words or agreement whatsoever, which shall be inserted in such policy of insurance, and nothing shall be recovered by the assured from the insurer for loss or damage, or for the premium which shall have been given as the consideration for such insurance."

From an attentive view of these statutes, the idea of the *British* parliament may be clearly and decidedly collected: and the statutes just referred to are the most general in their import that could be found upon the subject; and consequently the most proper to be mentioned here.

The

The question naturally occurs, what goods come under the description of prohibited goods, so as to render an insurance upon them void. To mention by name all the different kinds of merchandize, which fall under that description, would be tedious and, as it should seem, wholly unnecessary. Thus much may be laid down as a general proposition, that all insurances upon goods, forbidden to be exported or imported, by positive statutes, by the general rules of our municipal law, or by the king's proclamation *in time of war*; or which, from the nature of the commodity, and by the laws of nations, must necessarily be contraband, are absolutely null and void. Under the first division may be ranked all offences against the revenue laws of this country; and therefore if an insurance were made in order to protect smuggled goods, such insurance would doubtless be of no effect. To this head also may be referred any breach of the navigation acts, which were established for the protection, encouragement, and advancement of our commercial and naval interests; and which have produced those effects to the wonderful extension of our commerce, and the aggrandizement of the nation. At a very early period of the history of this country, several wise provisions were made by parliament, solely with this view: but on account of the low state of commerce in those ages, which was the more depressed, by the warlike spirit of the nation, and the intestine commotions that agitated and disturbed the state, those provisions in some measure failed of their effect. But the most beneficial statute for the trade and commerce of *England* is the famous navigation act, which passed soon after the restoration of *Charles the second*; the outlines of which were first framed, in the time of the commonwealth, by *Oliver Cromwell*. By the reports of historians, we do not find that he framed it with any view to those beneficial effects, which sprung from it, but with a partial and confined intention, being designed by him to mortify our own sugar islands, which were disaffected to the parliament, and held out for the king, by stopping the lucrative trade, which they then held with the *Dutch*. Another motive for his conduct was this; that as the *Dutch* were at that time rising into opulence and wealth, and had given him disgust; and as their commerce did not consist so much in the produce of their own country (which afforded but few commodities) as in being the general carriers and factors of *Europe*, he had it in his power to affect

5 Rich. 2.
c. 3.

Scobel, 132

7 Hume's
Hist. of Eng.
211.

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affect their trade in a considerable degree, by prohibiting all nations from importing into *England* in their own bottoms any commodity, which was not the growth and manufacture of their own country. At the restoration, however, those plans, the good effects of which had probably been experienced, were adopted by the legal and real constitution of the country, and were considerably improved by inserting clauses, which had been overlooked and omitted in the original design, or which time and experience had pointed out as necessary to the completion of that system, the beneficial effects of which are at this day most sensibly felt. It is not wholly impertinent in a work like the present to state briefly the outlines of a statute, so considerably affecting the commercial interests of the nation, and which has served as the groundwork of all subsequent laws for the good management of *British* navigation.

12 Car. II.
c. 11. f. 1.

The first section of the act declares, "that no goods shall be imported into, or exported out of, any plantations or territories to his majesty belonging in *Asia*, *Africa*, or *America*, but in such ships only as belong to the people of *England* or *Ireland*, *Wales* or *Berwick*, or are of the built of, and belonging to any of the said territories, as the proprietors thereof, and whereof the master, and three-fourths of the mariners are *English*, (which word, by a subsequent statute, 13 and 14 Car. II. ch. 11. f. 6. was explained to mean his majesty's subjects of *England*, *Ireland*, and his plantations generally), under penalty of the forfeiture of all the goods and commodities which shall be imported into, or exported out of, any of the said places, in any other ship or vessel, as also of the ship and vessel." It is

sect. 3.

also declared, "that no goods of the growth, manufacture, or production, of *Africa*, *Asia*, or *America*, be imported into *England*, *Ireland*, *Wales*, *Guernsey*, *Jersey*, or *Berwick*, in any other ships than such as belong to the people of *England*, *Ireland*, *Wales*, or *Berwick*, or of the plantations to his majesty belonging, as the proprietors thereof, and whereof the master and three-fourths of the mariners are *English*, under the penalty of the forfeiture of all such goods, and of the ship (a)." "No

See an act of
a W. & M.
f. 1. c. 9.
prohibiting
the import-
ation of
thrown silk.

Moock v.
Abel, 3 Bos.
& Pull. 35.

(a) Therefore where a policy was effected upon a Danish ship at and from Beesø (in which there are Danish settlements) to Copenhagen, and the ship loaded, on the 5th of March 1797, at Calcutta, contrary to the 12 Car. II. ch. 11. f. 1. the insu-

rance

"No goods of foreign growth, production, or manufacture,
 "which are to be brought into *England, Ireland, Wales, Guern-*
sey, Jersey, or Berwick, in *English*-built shipping, or other
 "shipping belonging to some of the aforesaid places, and navi-
 "gated by *English* mariners as aforesaid, shall be brought from
 "any other places but those of the growth or manufacture, or
 "from those ports where the goods are first usually shipped for
 "transportation, under the penalty of the forfeiture of all such
 "goods as shall be imported from any other place, as also of
 "the said ship."

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Sect. 4.
 This section
 was altered
 as to the im-
 portation of
 American
 drugs by
 7 Anne,
 c. 8. §. 12.

"It shall not be lawful to load in any ships, whereof any
 "stranger or strangers born (unless such as be denizens, or na-
 "turalized) be owners, part owners, or master, whereof three-
 "fourths of the mariners, at least, shall not be *English*, any
 "fish, victual, goods, and merchandizes, from one port or creek
 "of *England, Ireland, Wales, Guernsey, Jersey, or Berwick*, to
 "another port or creek of the same, under penalty, and forfei-
 "ture of all such goods, together with the ship or vessel."

Sect. 6.

"Where any privilege is given by the book of rates to goods
 "or commodities exported or imported in *English* built ship-
 "ping, that is to say, shipping built in *England, Ireland, Wales,*
Guernsey, Jersey, Berwick, or in any of the lands, dominions,
 "and territories belonging to his majesty, in *Africa, Asia*, or
America, it always is to be understood, that the master and
 "three-fourths of the mariners be *English*; and where it is
 "required that the master and three-fourths of the mariners
 "be *English*, the true intent thereof is, that they should con-

Sect. 7.

rance was held to be void, although the practice of loading ships at Calcutta had pre-
 vailed for a great length of time; and the act of 37 Geo. III. ch. 117. which passed
 soon after the shipment in question took place, authorized such shipments in future.

So also in the same court it was held, that a Swedish ship, insured at and from her
 loading port in the East Indies to Gottenburgh, had contravened the navigation laws of
 Great Britain, by taking in part of the cargo at Madras, and consequently that the in-
 surance was void.

Chalmers v.
 Bell, 3 Bos.
 & Pull. 604.

And in the Court of King's Bench it was subsequently held, that colonial produce
 could not legally be shipped from the British West Indies for Gibraltar; and cannot be
 therefore the subject of a valid insurance; nor does it alter the case, that leave was
 given by the policy to exchange the goods at another island, the goods never having
 been in fact exchanged, and the original destination, when shipped, being Gibraltar, that
 purpose was illegal.

Lubbock v.
 Potts, 7 East,
 442.

C H A P. XIII. "tinue such during the whole voyage, unless in case of sickness, death, or being taken prisoners in the voyage, to be proved by the oath of the master or chief officer of the ship."

Sec. 8. The eighth section prohibits the importation of goods of the growth of *Muscovy*, *Russia*, or the *Ottoman* or *Turkish* empire into *England*, except in *English*-built ships, whereof the master and three-fourths of the mariners must also be *English*, under the penalty of forfeiting both ship and goods.

Sec. 9. And for preventing the practice of colouring aliens' goods, the ninth section declares, that all wines of the growth of *France* or *Germany*, imported in any other than *English* vessels, shall be deemed aliens' goods, and pay all strangers' customs and duties: which provision is extended to certain commodities, named in the act, of the growth of *Spain*, the *Canaries*, *Madeira*, *Portugal*, or the *Western Islands*, and of *Muscovy*, *Russia*, and *Turkey*. It

Sec. 10. was also ordained by the next subsequent section of the statute, in order to prevent the colouring or buying of foreign ships, that no foreign ship should pass as a ship to *England*, *Ireland*, *Wales*, or *Berwick*, until those claiming the said ship should make appear to the chief officer of the customs that they were not aliens, and should have taken an oath, that such ship was *bona fide*, and without fraud, by them bought for a valuable consideration, expressing the sum, and also the time, place, and persons, from whom it was bought, and who were the part owners: upon which oath that they should receive a certificate, whereby such ship should in future pass, and be deemed a ship belonging to the said port, where the oath was so taken, and receive the privileges of such ship.

Sec. 11. The officers of the customs are not to allow any privilege to any foreign-built ship, until certificate granted, or proof of those things required by this act. By the 13th section it is provided, that this act is not intended to restrain the importation of any *East India* commodities, laden in *English*-built shipping, whereof the master and three-fourths of the mariners are *English*, from the usual place of loading in those seas, to the southward and eastward of the *Cape of Good Hope*, although the said ports be not the very places of their growth. There is also a provision in favour of goods imported from *Spain*, *Portugal*, the *Azores*, *Madeira*, or *Canary* islands; and concerning goods and commodities from *Scotland*, and seal oil from *Russia*. The 17th section imposes a duty

Sec. 9.
Upon this
sec. see 13 &
14 Cap. 2.
c. 11. f. 23.
6 Geo. 1.
c. 15. f. 1.

Sec. 11.
Vide 6 Ann.
c. 17. f. 21.
Sec. 13.

Sec. 14 &
16.

Sec. 17.

a duty upon every *French* ship coming into *England*. And it was lastly enacted, that the ships of *England, Ireland, Wales, or Berwick*, sailing to any *English* plantations in *Asia, Africa, or America*, should be bound in sufficient sureties, in proportion to the burthen of the ship, to bring the goods loaded at such plantations into *England*.

Such were the provisions of this famous statute, framed by the wisdom of our ancestors for the promotion of our naval and maritime strength : upon this statute have all subsequent commercial regulations been established ; and from this source they have derived solidity and strength. But in vain have such rules been framed, if insurances upon the importation or exportation of the commodities mentioned in these statutes are to be tolerated. It would be to render void these good and wise plans, and to set the acts of the legislature at defiance. The conclusion is, that such insurances are absolutely null, and of no effect.

It was said, in a former part of this chapter, that an insurance upon any goods, the exportation or importation of which was forbidden by the royal proclamation in time of war, was equally void, as if prohibited by statute. The reason of this is, that the king's proclamation in time of war has equal force with an act of parliament, and is no less binding upon his subjects. The consequence of this doctrine is, that the breach of such a prohibition is equally criminal with the breach of a statute ; and no contract can be founded upon such criminal act, or have any validity. These principles were fully considered in the preceding chapter ; and the law upon the subject was clearly settled in the case of *Delmada v. Matteus*, there cited at length ; in which it was held, that the king had an undoubted right to lay on an embargo in time of war : that the consequence of a breach of such a proclamation had not been fully ascertained, but it was certainly a criminal act ; and wherever a man makes an illegal contract, the courts of justice will not lend him their aid to compel a performance. The underwriter was accordingly discharged from the demand set up against him.

1 Black.
Comm. 270.

Delmada v.
Motteus,
B. R. Mich.
25 Geo. III.
Vide ante,
p. 321.

We come now to consider those commodities which, from their nature, as well as by the laws of nations, are contraband. Upon this occasion *Grotius* and *Bynkershoek* are the best guides that can possibly be followed ; and from them we may collect,

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Lib. 3. c. 1.
§ 5.

L. b. 1. c. 11.

that it is unlawful to carry any thing to besieged cities or fortresses; a rule which they declare to have been established by common consent, and the usage of all nations. *Grotius* divides goods into three kinds: such as can only be of use in time of war; and these are clearly contraband, such as arms and ammunition: 2dly, Such as answer no purpose in war, and are merely intended for pleasure; and these may be lawfully conveyed to an enemy. But the third kind are of a mixed nature, such as money, provisions, ships, and the materials of ships; in which case, before we can decide upon the propriety of exporting such commodities, the situation of the war between the contending parties is to be considered. Upon this point his reasoning is excellent: "If," says he, "I cannot defend myself without intercepting the commodities intended for my enemies, necessity will give me the right, but still I shall be liable to make restitution, unless some other cause of seizure appears. For if the conveyance of such commodities to the enemy shall prevent the execution of my plans, and he who carried them knew that I had besieged or blockaded the town, and that peace or a surrender was expected, he shall be answerable for the loss sustained by his misconduct." With this opinion *Bynkershoek* for the most part coincides: because, as he observes, the siege alone is the cause why it is not lawful to carry any thing to the besieged, whether it be contraband or not: for a besieged city is never compelled to surrender by force, but by famine, and the want of other necessaries. If it were to be permitted to supply them with the things of which they stand in need, perhaps the assailants would be obliged to raise the siege. But as it is impossible to say of what things the besieged stand in need, or in what they abound, every species of commodity is forbidden to be carried into the garrison; for otherwise there would be no certain rule of settling disputes. This learned author, however, differs from *Grotius*, in that passage where he says, "the carrier of goods shall be answerable, if peace or a surrender was expected, and it was frustrated by such means." *Bynkershoek* is of opinion, that such doctrine is neither consonant to reason, nor to the agreements entered into by the laws of nations. He reasons thus; "Quæ ratio me arbitrum constituit de futurâ ditione aut pace? et si neutra expectetur, jam licet obsessis quælibet advenire? imo nunquam licet, durante obsidione, et amici non est causam amici perdere, vel quoquo modo deteriorem facere."

“ facere. Et qui advexit, non ultra tenebitur, quam de damno
 “ culpâ dato? atquin in subditis id semper capitale fuit, quin et
 “ in amicis, edicto ante monitis, sæpe et in non monitis.
 “ Rurfus, si quis nondum advexit, sed, dum advehere voluit,
 “ deprehendatur, sola rerum interceptarum retentione crimus
 “ contenti, idque donec caveatur, nihil tale in posterum com-
 “ missum iri?” He concludes thus: “I do not agree to that
 “ opinion, having learnt from the custom and usages of all na-
 “ tions, to sell all intercepted goods, and often to inflict, if not
 “ a capital, at least a corporal punishment.”

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Such are the opinions of these two very learned writers, who, although in some respects they differ, agree in establishing this as a settled, undisputed rule, that whoever conveys any necessaries to a besieged town, camp, or port, is guilty of a breach of the law of nations. This being the case, an insurance upon such commodities must necessarily be void and of no effect, agreeably to the principles which have already been advanced.

Grot. Bynk.
loc. cit.

One question only remains to be considered; how far insurances upon goods, the exportation and importation of which are forbidden by the laws of other countries, are valid? In *England*, the law is clear, as it has been laid down by two very great judges, that such insurances are good; because the foundation of the contract is not illicit. It has been expressly held by Lord *Mansfield* more than once, in which he has been confirmed by the whole court of King's Bench, that one nation never takes notice of the revenue laws of another; and therefore such an insurance was certainly good and valid. A similar opinion seems to have been entertained by Lord *Hardwicke*; at least so much may be collected from his argument, in a case reported in *Vesey*.

Dougl. 238.

1 Ves. 319.

But although this point is so clearly settled by the law of *England*, in which also the law of *France* coincides, it is certain that the expediency of it has been a question which has very much engaged the attention of some considerable *French* authors. Their opinions can in no way affect the law of *England*, which stands upon much higher authority than the sentiments of speculative men, however respectable; but it may be productive
 of

1 Emerigon,
p. 210.

C H A P. of some amusement, if not instruction, to see by what arguments
 XIII. the two different opinions are supported.

Pothier Tr.
 d'Assur-
 ances, c. 1.
 § 2. art. 2.
 § 2.

Those who contend that such insurances are illegal, argue in this manner : that they who carry on commerce in a country are obliged, by the custom of nations, and natural law, to conform to the laws of that country where they trade. Every sovereign has power and jurisdiction over every thing done in the country, where he has a right to command ; he has consequently a right to make laws, relative to commerce within his dominions, which bind all those who trade, as well strangers as subjects. No one can dispute with the sovereign the right he has to retain in his own country certain merchandizes which are there to be found, and to prohibit the exportation of them. To export them contrary to his orders, is to strike a blow at his undoubted authority ; and consequently it is unjust. But admitting, say they, that a *Frenchman* would not himself be subject to the law of *Spain*, for the trade which he carries on in *Spain*, it cannot be denied that the *Spaniards*, whose assistance he requires are subject to those laws ; and that they offend extremely in assisting him to export that, the exportation of which is prohibited by law. This species of trade then is to be considered as illicit, and contrary to good faith ; and consequently the contract of insurance, introduced in order to protect it, by charging the insurer with the risk of confiscation, is illicit, and cannot induce any obligation.

2 Val. Com.
 229.
 1 Emerigon,
 212.

Those who support the opposite doctrine contend, that the exportation or importation of commodities prohibited by foreign laws is no offence ; and that the means employed to effect it are regarded by the law, as a laudable and ingenious exertion of skill. Thus the exportation of certain commodities is prohibited in *Spain*, which the government of that country has a right to do : but the laws of his Catholic Majesty are not the rule of action for *Frenchmen*. It is allowed them to bring from *Spain* into *France* piastres, pistoles, and silks, for the support of the Banks, the manufactures, and the commerce of that country. These merchandizes are a lawful branch of trade ; and there is no reason why they should not be the subject matter of a contract of insurance. But above all, they insist, that they are justified
 by

by the constant custom; and that the reasoners on the other side ought to be less strict, when it is considered, that this contraband trade is a vice common to all commercial nations. The *Spaniards* and *English* in time of peace practise it in *France*: it is therefore permitted to carry it on in their respective countries, by way of reprisal.

Whatever difference there may be on the question of expediency; it is universally admitted by the *French* writers, that insurances upon such goods are valid. We have already seen that the same ideas have been adopted by the law of *England*; and that every policy upon goods, the exportation and importation of which is not prohibited by the municipal laws of this country, or by the general laws of nations, is legal and binding upon the parties; and the underwriter must answer for every loss arising by means of any of the usual perils.

END OF VOL. I.



A
SYSTEM
OF THE LAW OF
MARINE INSURANCES.

VOL. II.



A
S Y S T E M
OF THE LAW OF
MARINE INSURANCES.

WITH THREE CHAPTERS,
ON BOTTOMRY,
ON INSURANCES ON LIVES,
ON INSURANCES AGAINST FIRE.

By JAMES ALLAN PARK, Esq.
ONE OF HIS MAJESTY'S COUNSEL.

Lex (de qua agimus) est fons equitatis. CICERO.

THE SIXTH EDITION,
WITH CONSIDERABLE ADDITIONS.

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CHAPTER THE FOURTEENTH.

Of Wager-Policies.

HAVING in the four preceding chapters stated the various cases, in which the contract of insurance is void from its very commencement, on account of its repugnancy to those principles of justice, equity, and good faith, which are the great foundation of all contracts between man and man; we proceed to treat of those policies, which by the positive statute law of the country are declared to be absolutely null and void. Of these the largest class are wager-policies, or policies as they are called, upon interest or no interest. C H A P.
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The nature of the contract of insurance, in its original state, was, that a specifick voyage should be performed free from perils; and in case of accidents, during such voyage, the insurer, in consideration of the premium he received, was to bear the merchant harmless. It followed from thence, that the contract related to the safety of the voyage thus particularly described, in respect either of ship or cargo: and that the person insured could not recover beyond the amount of his real loss.

In process of time, however, variations were made, by express agreement, from the first kind of policy; and in cases where the trader did not think it proper to disclose the nature of his interest, the insurer dispensed with the insured having any interest either in the ship or cargo. In this last kind of policy (of which we are now to treat) "valued free from average," and "interest or no interest," it is manifest, that the performance of the voyage or adventure, in a reasonable time and manner, and not the bare existence of the ship or cargo, is the object of the insurance.

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Affievedo v.
Cambridge,
10 Mod. 77.
Goddard v.
Garrett,
2 Vern. 269.

Such an object as that, from a reference to the real nature of an insurance, as stated in the outset of the chapter, namely, that it is a contract of indemnity from a real and manifest, not from a supposed and ideal loss, must have been originally bad. Indeed it has been declared from the bench, prior to the discussion of *Affievedo v. Cambridge*, in the reign of queen *Anne*, that such insurances were formerly bad; for it is taken for granted in 1692 to be settled law, that in former times, if one had no interest, though the policy ran, *interest or no interest*, the insurance was void; because insurances were made for the benefit of trade, and not that persons unconcerned therein, or uninterested in the subject matter, should profit by them.

Depaiha v.
Ludlow,
Comyn's
Rep. 360.

The idea thus started seems to receive some confirmation from the counsel, and was not contradicted by the Court in the case of *Depaiha v. Ludlow*, for the counsel there observed, that insurances upon interest or no interest were introduced *since* the revolution.

2 Mag. 70.
65. 88. 189.
257.

If this was the law of *England* in this respect, previous to the revolution, as these cases suppose it to be, it was consonant to the positive laws of most of the commercial states and countries in *Europe*. For we find that by positive regulations of *Middlebourg*, *Genoa*, *Konyngsburg*, *Rotterdam*, and *Stockholm*, all insurances upon wagers, or as interest or no interest, are declared to be absolutely void, and of no effect.

But though this mode of insuring gained footing in *England*, yet when introduced, the courts of justice looked upon these contracts with a jealous eye; and by their determinations shewed the strong prejudices which they entertained against them. The courts of Equity in particular manifested that their inclination would lead them as much as possible to suppress such a species of contract: nay, that they still considered them as void. This is evident from two cases in *Vernon's Reports*.

Goddard v.
Garrett,
2 Vern. 269.
Trin. Term.
1692.

In one of them, the defendant had lent money on a bottomry bond, but had no interest in the ship or cargo; the money lent was 300*l.* and he insured 450*l.* on the ship; the plaintiff's bill

was

was to have the policy delivered up, because the defendant was not concerned in point of interest as to the ship or cargo.

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Per curiam. Take it that the law is settled, that if a man has no interest, and insures, the insurance is void, though it be expressed in the policy, *interested or not interested*. The reason the law goes upon is, that insurances were made for the benefit of trade, and not that persons unconcerned therein, and who were not interested in the ship, should profit thereby; and *where one would have the benefit of the insurance, he must renounce all interest in the ship*. And the reason why the law allows that a man having some interest in the ship or cargo may insure more, or five times as much, is, that a merchant cannot tell how much or how little his factor may have in readiness to lade on board his ship. *Per Cur.* Decree the policy to be delivered up to be cancelled.

From the spirit of this decision it may likewise appear, that the Court of Chancery inclined to think, that an insurance made without the benefit of salvage to the insurer, was unconscientious, and a proper subject for relief in equity; for the Court expressly says, where one would have the benefit of the insurance, he must renounce all interest in the ship.

In another case also, which was on a policy of insurance on goods, by agreement valued at 600*l.* and the insured not to be obliged to prove any interest: the Lord Chancellor ordered the defendant to discover what goods he put on board; for although the defendant offered to renounce all interest to the insurers, yet it must be referred to the Master to examine the value of the goods saved, and to deduct it out of the value or sum of 600*l.* at which the goods were valued by the agreement.

Le Pyre.
v. Farr,
2 Vern. 716.
In Chancery,
Michellmas
Term, 1716.

There was one very remarkable difference between policies upon interest, and such as were not, of which I believe notice has already been taken in a former part of this work: namely, that in policies upon interest, you recover for the loss actually sustained, whether it be total or partial: but upon a wager-policy, you can never recover but for a total loss. All the doctrine, which turns upon this distinction between interest and wager-policies was considered at much length by Lord Mansfield in the

2 Burr. 683.
Vide ante,
p. 297.

C H A P. famous cause of *Goss v. Withers*, to which we have had occasion
 XIV. more than once to refer.

Vide ante,
 c. 2.

It has already been observed, that the security given to the insured was very considerably increased by the erection of two Assurance Companies, which were incorporated by royal charter in the year 1720; for the legislature had taken care that those corporations should have sufficient funds to answer any demands that might be made upon them, in the common course of business. But this additional security for the insured soon produced many dangerous and alarming consequences, which, if they had not been checked, would have proved very detrimental to the trade of this country. For instead of confining the business of insurances to real risks, and considering them merely as an indemnity to the fair dealer against any loss which he might sustain in the course of a trading voyage, which, as we have seen, was the original design of them; that practice, which only prevailed since the revolution, of insuring ideal risks, under the names of *interest or no interest*, or *without further proof of interest than the policy*, or *without benefit of salvage to the underwriters*, was increasing to an alarming degree, and by such rapid strides as to threaten the speedy annihilation of that lucrative and most beneficial branch of trade. All these various kinds of insurance just enumerated (and many others, which the ingenuity of bad men found no difficulty in devising), having no reference whatever to actual trade or commerce, were very justly considered as mere gaming or wager-policies: and therefore the legislature thought it necessary to give them an effectual check, and, by positive rules, to fix and ascertain what property or interest a merchant should be permitted to insure.

Accordingly an act of parliament, passed in the 19th year of the reign of king George the Second, intituled, “an act to regulate insurance on ships belonging to the subjects of *Great Britain*, and on merchandizes or effects laden thereon.” As this act is the most important and most extensive in the whole code of statute law, with regard to insurance, I shall now cite as much of it at length as relates to the present chapter, and afterwards the other clauses of it under those heads, to which they more immediately apply.

The causes which co-operated to induce the legislative body to pass such an act, are fully stated in the preamble. "Whereas it hath been found by experience, that the making assurances interest or no interest, or without further proof of interest than the policy, hath been productive of many pernicious practices, whereby great numbers of ships, with their cargoes, have either been fraudulently lost and destroyed, or taken by the enemy in time of war; and such assurances have encouraged the exportation of wool, and the carrying on many other prohibited and clandestine trades, which by means of such assurances have been concealed, and the parties concerned secured from loss, as well to the diminution of the publick revenue, as to the great detriment of fair traders; and by introducing a mischievous kind of gaming or wagering, under the pretence of assuring the risk on shipping, and fair trade, the institution and laudable design of making assurances hath been perverted; and that, which was intended for the encouragement of trade and navigation, has, in many instances, become hurtful of, and destructive to the same."

C H A P.
XIV.
19 Geo. II.
c. 37.

"For remedy whereof be it enacted, that no assurance or assurances shall be made by any person or persons, bodies corporate or politick, on any ship or ships belonging to his majesty, or any of his subjects, or on any goods, merchandizes, or effects, laden or to be laden on board of any such ship or ships, *interest or no interest, or without further proof of interest than the policy, or by way of gaming, or wagering, or without benefit of salvage to the assurer*; and that every such insurance shall be null and void to all intents and purposes." Sect. 1.

"Provided always, that assurance on private ships of war, fitted out by any of his majesty's subjects solely to cruize against his majesty's enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the assurer; any thing herein contained to the contrary thereof in any wise notwithstanding." Sect. 2.

"Provided also, that any merchandizes or effects from any ports or places in *Europe or America*, in the possession of the crowns

C H A P. "crowns of *Spain* or *Portugal*, may be assured in such way and
 XIV. "manner, as if this act had not been made."

Sec. 4. The fourth section relates to re-insurances, which will be the subject of the following chapter.

Sec. 5. "And be it enacted, that all and every sum and sums of money to be lent on bottomry, or at *respondentia*, upon any ship or ships belonging to any of his majesty's subjects, bound to or from the *East Indies*, shall be lent only on the ship, or on the merchandize or effects laden, or to be laden, on board of such ship, and shall be so expressed in the condition of the said bond: and the benefit of salvage shall be allowed to the lender, his agents or assigns, *who alone shall have a right to make assurance on the money so lent*: and no borrower of money on bottomry or *respondentia*, as aforesaid, shall recover more on any insurance than the value of his interest in the ship, or in the merchandizes or effects laden on board of such ship, exclusive of the money so borrowed; and in case it shall appear, that the value of his share in the ship, or in the merchandizes or effects laden on board, doth not amount to the full sum or sums he had borrowed as aforesaid, such borrower shall be responsible to the lender for so much of the money borrowed, as he hath not laid out on the ship or merchandize laden thereon, with lawful interest for the same, together with the assurance, and all other charges thereon, in the proportion the money not laid out shall bear to the whole money lent, notwithstanding the ship and merchandizes be totally lost."

Upon this last section, of which we shall treat more fully in the chapter on Bottomry, it may be sufficient in this place to observe, that none but the lender shall have a right to make insurance on the money lent. It is also to be remarked, that this regulation of insurance on bottomry or *respondentia* interest, extends only to *East India* ships: and therefore, an insurance of a *respondentia* interest upon any other ships may be made in the same manner as they used to be before this act. It has also been decided upon this clause of the act, that it never meant or intended to make any alteration in the manner of insurances: and it was declared by the whole court in the case of *Glover v. Black*,
 which

which was fully reported in a former chapter, to be the established law and usage of merchants, that *respondentia* and bottomry must be mentioned and specified in the policy of insurance.

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Glover v.
Black.
3 Burr.
1303.
Vide ante,
c. 1. p. 12.

By the first section of the act it is clear that at this day all insurances made contrary to it are absolutely void and of no effect: which, as has already been shewn, was also the case by the ancient law of this country. It may now be material to consider first, what cases have, by the construction put by the learned judges upon this statute, been held not to fall within its description: and secondly, those which do, and in which, the policies have consequently been holden to be void.

It was formerly a matter of doubt, whether the act was meant to extend to insurances of foreign property, and on foreign ships. The better opinion, however, was, that it did not; for it was clear, that such insurances did not fall within the words of the statute; and from an attentive consideration of the preamble, they do not seem to come under the description of the mischiefs, against which it was the intention of the legislature to provide. But these doubts are entirely at an end by several decisions of the courts; and particularly by a case, in which it was expressly declared by the court (and the reason for it stated), that the act was not designed to extend to foreign ships.

The case was this: the policy was on goods, on board three French vessels, from *St. Domingo* to *Bourdeaux*. The material part of it, as to this case, was in the following words: "On all goods loaden or to be loaden on board the ships *Le Soigneux*, *La Pucelle*, *Le Vainquer*, all or any of them. The said goods, and merchandizes by agreement are, and shall be valued at
(a) on 25 casks of clayed sugar, and 12 hogstheads of muscavadoes: the policy to be deemed sufficient proof of interest, in case of loss." The first count in the declaration stated, that goods to a great amount, being the property of certain foreigners, had been shipped on board *Le Soigneux*, and that she had been lost. The second averred, that the goods were shipped on board the three ships, or some or one of them, to the

TheHustler
v. Fletcher.
Doug1. 315.

(a) This was blank, as here printed.

C H A P. amount of the sum insured; and that two of them had been captured, and the other lost.
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This case came before the court upon a motion to set aside the writ of enquiry, which had been executed before the sheriff, after a judgment by default, on this ground: that the jury had assessed the damages to the amount of the defendant's subscription, without any proof of the amount or value or any evidence whatever, except that of the defendant's handwriting to the policy. In addition to this objection, an affidavit was produced, tending to shew, that in fact the insured had no interest. It was argued for the defendant, that by the express agreement of the parties, no other proof of interest but the policy was required; and this insurance on foreign ships and property was not within the statute prohibiting such policies; so that the plaintiff was entitled to recover the sum insured by the defendant, even if it could be proved that the insured had no property on board. The court said that this was not a policy within the statute, foreign ships not having been included in that act, on account of the difficulty of bringing witnesses from abroad to prove the interest. The only difficulty there could have been here, was from the circumstance of there having been three ships; but the second count was so framed, as to make the case the same, as if there had been but one. By suffering judgment to go by default, the defendant has confessed the plaintiff's title to recover; and the amount was fixed by the stipulation in the policy.

Crauford v. Hunter,
8 Term Rep.
121. See the
same case,
post 360.
Crauford v. Lucena,
S. P.
See 35 Geo.
111. c. 80.

In a still more modern case, which was much discussed in two arguments, one of the points was, the insurance being on *Dutch* prize ships, whether a count in the declaration, averring that the plaintiffs as commissioners for the disposal of *Dutch* ships and effects made the insurance, and that the said ships, or any of them, were not belonging to his majesty, or any of his subjects, was good. This point came on upon a demurrer: and after argument,

Lord *Kenyon* said—"This question depends on the construction of the statute 19 Geo. 2. c. 37. for notwithstanding the argument, I think at common law a person might insure without having any interest; but the preamble and enacting part of the statute

statute remove all doubt ; for the act recites the mischiefs and inconveniences that had arisen from the making of assurances interest or no interest, and then it enacts (not declaring) that no such assurance shall be made, except in certain cases, which for very wise and politic reasons were excepted. Therefore I am satisfied that this count is good, unless it be on an insurance prohibited by that statute. But that statute only applies to ships belonging to his majesty or any of his subjects, and does not extend to foreign ships. The defendant's counsel then wished us to consider these ships as belonging to the government of this country: but that cannot be, for the property in captured ships is not altered before condemnation in the court of Admiralty.

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It was formerly thought, that a *valued* policy was a *wager-policy*, like interest or no interest. But this idea is now exploded, as we shall presently shew by a solemn decision of the court of King's Bench. Of the difference between open and valued policies much has been already said ; and the origin of the latter was derived from this source, it being sometimes troublesome to the trader to prove the value of his interest, or to ascertain the quantity of his loss, he gave the insurer a higher premium to agree to estimate his interest at a precise sum. To recover upon this kind of policy, the insured need only prove that he had an interest, without shewing the value. If indeed it appeared, or could be made appear, that the interest proved was merely a cover to a wager, in order to evade the statute, there is no doubt such a policy would be void.

Vide ante,
c. 1.

All this doctrine was very fully stated, and commented upon by Lord *Mansfield*, in giving judgment in a cause then depending in the court of King's Bench. "A valued policy," said his Lordship, "is not to be considered as a *wager-policy*, or like *interest or no interest*. If it were, it would be void by the act of 19 Geo. 2. c. 37. The only effect of the valuation is fixing the amount of the prime cost ; just as if the parties had admitted it at the trial : but in every argument, and for every other purpose, it must be taken that the value was fixed in such a manner, as that the insured meant only to have an indemnity. If it be undervalued, the merchant himself stands insurer for the surplus. If it be *much overvalued*, it must be done

Lewis v.
Rucker,
2 Burr.
1167.
Vide ante,
c. 6. p. 132.

C H A P.
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“ done with a bad view ; either to gain, contrary to the 19th of
“ the late king ; or with some view to a fraudulent loss : there-
“ fore an insured never can be allowed to plead in a court of
“ justice, that he has greatly overvalued, or that his interest
“ was a trifle only. It is settled, that upon valued policies the
“ merchant need only prove some interest, to take it out of
“ 19 Geo. 2. because the adverse party has admitted the value :
“ and if more were required, the agreed valuation would signify
“ nothing. But if it should come out in proof, that a man had
“ insured 2000*l.* and had interest on board to the value of a
“ cable only ; there never has been, and I believe there never
“ will be a determination, that by such an evasion the act of
“ parliament may be defeated. There are many conveniences
“ from allowing valued policies : but where they are used merely
“ as a cover to a wager, they would be considered as an evasion.
“ The effect of the valuation is only fixing conclusively the prime
“ cost. If it be an open policy, the prime cost must be proved :
“ in a valued policy it is agreed.” For these reasons Lord *Mans-*
field held, that a valued policy is not void by the statute of the
19 Geo. 2.

The passage just quoted at length was, in a subsequent case, referred to in the judgment of the court ; and the doctrine there advanced was adopted and confirmed,

Grant v.
Parkinson
Mich.
22 Geo. III.
in B. R.

It was an action on a policy of insurance on the ship *Providence* at and from *Surinam*, or whatsoever other ports in the *West Indies* at which the ship might load, to *Quebec*. At the trial before Lord *Mansfield*, at the sittings after *Trinity Term* 1781, the principal question on the merits was, whether the plaintiff had an insurable interest. It was an insurance on the profits expected to arise on a cargo of molasses belonging to the plaintiff, who had a contract with government to supply the army with spruce beer. Lord *Mansfield* thought it an insurable interest. But the part of the case, which calls for our attention at present, was a clause declaring, “ that in case of loss, it was agreed that the profits should be valued at 1000*l.* without any other voucher than the policy.” This, it was insisted, rendered the policy void, as well within the letter, as within the spirit of the 19 Geo. 2. c. 37.

Lord

Lord *Mansfield*, at the trial, inclined to think that the contract was a fair one; but still he could not get over the objection, the instrument being void on the face of it. His Lordship, however, saved the point for the opinion of the court, a verdict being entered for the plaintiff, subject to that reference.

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In *Michaelmas* Term following, the matter came on to be heard; when after full argument at the bar,

Lord *Mansfield*, C. J. said: "I have, since the sittings at *Guildhall*, on further consideration, changed my opinion. I then thought the present policy within the act of parliament: I now think otherwise. On the construction of the act, it has uniformly been held, that a valued policy is not void. It is incumbent on the plaintiff to prove some interest; but it is not necessary to go into the whole value. In the case of *Lewis v. Rucker*, this doctrine was much considered."—[Here his Lordship read the words already reported, and then he proceeds thus] "This insurance is on the profits of a cargo, belonging to a man, having a contract to supply the army, and if it arrive, the profits are pretty certain. The meaning of the policy is not to evade the act of parliament, but to avoid the difficulty of going into an exact account of the quantum. I cannot distinguish it from a valued policy; there is no pretence for saying it is a *wagering* one." The other judges concurred; and the *posse* was given to the plaintiff.

In a case before the late Lord *Kenyon*, where the interest was stated in the policy to be "on the commissions of the plaintiff as consignee of the cargo, valued at 1500*l.*", his lordship expressed a strong opinion, that this was a good insurable interest; but the matter being compromised, it did not come to any decision. Since that time, however, the question was brought in a more solemn manner for the opinion of the court upon a case reserved. The policy stated the insurance to be *on profits valued at 2000*l.** The declaration averred, and the fact was, that the insured was interested in the profits to arise, and be made, from the sale and disposal of the said cargo of goods. This case was twice argued at the bar, once in the time of Lord *Kenyon*, and after time taken to deliberate, the judgment of Mr. Justice *Grose*,

Flint v. Le. Mesurier.
Sittings after
Hil. Term
1796, at
Guildhall.

Barclay v. Cousins,
a East's Re.
544.

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2 East's R.
549. note
(e).

Hodgson
v. Glover.
6 East: 316.

King v.
Glover,
2 New R.
206.

Knox v.
Wood,
Mich. Sit-
tings at
Guildhall,
1808.

Mr. Justice *Le Blanc* and himself; was delivered in a very luminous and perspicuous manner by Mr. Justice *Lawrence*, who declared, in the close of it, that Lord *Kenyon* concurred in the judgment so pronounced. The decision was, that such profits were the subject of insurance, and the case is argued by his lordship upon general principles of commercial speculation; upon the opinions of foreign jurists, and upon the cases of *Grant v. Parkinson* above stated, and another, prior in point of time to it, namely, *Henrickson v. Margetson*, in *Michaelmas Term 1776*. But in such a case it is necessary to shew satisfactorily that the loss of profits arose from a peril insured against, such as perils of the sea, &c., not from the state of the market, for which the underwriters are not responsible. In short, it is incumbent on the assured to shew, as was observed by Mr. Justice *Lawrence*, in the case now referred to, that if there had been no shipwreck, there would have been some profit.

So also in the Common Pleas, after much deliberation, all the Judges of that court were of opinion that an *African* captain, who, besides his wages, was entitled for his trouble and attention in purchasing slaves on the coast of *Africa*, and selling and disposing of them in the *West Indies*, to so much *per cent.*, and other privileges, had a good insurable interest in this remuneration.

In all the cases above quoted, there was something of certainty in the profits or commissions which the assured expected; and it appeared in them that by a peril insured he was prevented from enjoying the profit. But where not only the profits are an expectation, but the obtaining a cargo, out of which the commission is to arise, is also an expectation, such an insurance cannot be supported without entirely destroying the intention of the stat. 19. Geo. 2. ch. 37. The case in which the consideration, which I have just mentioned, occurred, was, in an assurance "on the ship *Friendship*, at and from *Bristol* to *St. Thomas's* " and *Jamrica*, and from thence back to *Dublin*, on commissions valued at 1000*l.*" The admitted facts were, that the plaintiff and one *Alexander Robe*, of *Bristol*, merchant, on the 26th *March*, 1807, entered into a charter-party for the voyage in question: that the ship *Friendship* sailed from *Bristol* with a cargo

cargo for *St. Thomas's*, but which cargo was not the property of the plaintiff, nor insured by this policy: that the ship delivered her cargo at *St. Thomas's*, and proceeded from thence in ballast for *Jamaica*, and was captured before her arrival, and carried into *Cuba*, where she was ransomed by the captain, and again proceeded for, and arrived at *Jamaica*: that the policy in question was meant and intended by the plaintiff as an insurance upon the commissions expected to arise upon the sale and disposition by the plaintiff in *Dublin* of produce expected to be shipped on board the said ship at *Jamaica*. When the counsel for the plaintiff had opened this case, Lord *Ellenborough* said, it is agreed, that this insurance was on the commissions on the homeward cargo; and it is also agreed, that the vessel arrived at the place where that homeward cargo was to be shipped, and no reason is assigned why it was not shipped. No cargo appears to have been ready; this is an insurance of an expectation of an expectation. If courts of justice were to give effect to insurances of this description, they had at once better repeal the statute against wager policies. The plaintiff was nonsuited.

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In the following term a motion was made to set aside this nonsuit, which was refused by the whole court, thus confirming the opinion delivered by Lord *Ellenborough* at *Guildhall*.

In another case also it appeared, that an insurance had been made upon any of the packet-boats that should sail from *Lisbon* to *Falmouth*, or such other port in *England* as his Majesty should direct, for one year, from *October 1763*, to *October 1764*, upon any kinds of goods and merchandizes whatsoever. And it was agreed, that the goods and merchandizes should be valued at the sum insured on such packet-boat, without farther proof of interest than the policy; and to make no return of premium for want of interest being on bullion or goods. The insured had an interest in bullion on board the *Hanover* packet, being one of the king's packets between *Lisbon* and *Falmouth*: and it was totally lost within the time mentioned in the policy.

Da Costa
v. Firth,
4 Burr.
1966.

This case has already been quoted for another purpose: but on this point, the court held, that this was a policy of a peculiar sort; and was an exception out of the statute 19 *Geo. 2. c. 37*. It is a mixed policy; partly a wager-policy, partly an open one: and

Vide ante,
p. 167. 212.

C H A P. and it is a valued policy, and fairly so, without fraud or misrepresentation. Therefore the loss having happened, the insured is entitled as for a total loss.

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It has also been solemnly settled, that upon a joint capture by the army and navy, the officers and crews of the ships, before condemnation, have an insurable interest, by virtue of the prize act, which usually passes at the commencement of a war.

Le Cras v.
Hughes,
B. R. Esq.
22 Geo. III.

This was so held in an action upon a policy of insurance on the ship *St. Domingo*, at and from *Omoa* to *London*; upon which a case was reserved for the opinion of the court. The facts of the case were these: Captain *Luttrell*, commanding five of his majesty's ships, and Captain *Dalrymple*, commanding a party of the land forces, captured two *Spanish* register ships, lying under the protection of *Fort Omoa*: that the ship *St. Domingo* (on which the insurance was made) was one of the prizes, and was coming home laden with the property then captured; upon which ship the defendant underwrote 500*l.*: and that the ship was lost by perils of the sea. The question was, whether, by virtue of the prize act of the 19 *Geo.* 3. c. 67. the officers and crews of the ships under Captain *Luttrell* had such an insurable interest in the *St. Domingo*, as to entitle them to recover?

Lord *Mansfield*.—"There are two questions in this cause: 1st, Whether the sea-officers had an insurable interest? This will depend on the prize-act and proclamation. 2dly, Whether possession would entitle them to insure, upon the bare contingency of a future grant from the crown? As to the first, consider the act of parliament, which gives to all the people on board, that is, to the flag officers, commanders, and other officers; to the seamen, marines, and soldiers on board every ship and vessel of war, the sole interest and property of and in all and every ship and vessel, goods, and merchandizes, which they shall take during the war, after condemnation. Does the act say, that the seamen only shall take? does it leave a joint capture by the army and navy undefined? Certainly not. Suppose, for instance, a case which I remember to have happened: a *Dutch* and *English* fleet combined captured some ships; the *English* sailors could not take solely; nor could the act mean that they should

should have nothing. In the case in question, suppose captain *Dalrymple* had given no assistance, is there any doubt that captain *Luttrell* would have taken the whole? The only difference is, that now he has not the merit of a sole capture. The word "*soldiers*" in the proclamation, means soldiers on board the ship. Thus it stands on the act and proclamation. But supposing that doubtful, as far back as queen *Anne's* time down to the present, wherever a capture has been made by a king's ship or a privateer, the crown has always given a grant of it after condemnation. There is no instance to the contrary. Is then the contingency of the ship's coming safe such an interest as the captor may insure? Insurance is a contract of indemnity; some interest is necessary, but not any particular form of interest: it does not depend on a vested formal interest. The question is, Whether this contingency is such a benefit to the assured, as will make it a loss to him, if the ship does not arrive? An insurance on the profits of a voyage was holden to be good. (*Vide supra*, p. 354) An agent of prizes may insure the arrival of a ship, which will produce him profit; for though he has not the possession of the property, he has such an interest in the ship coming home, as that he may insure. Here the possession is in the assured, and a certain expectation of receiving the property captured from the crown, which gives him an interest in the arrival. It is not a vested interest, but such an expectation as never was defeated. Judgment for the plaintiff (a).

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So in a more modern case it has been held that the captors of ships seized by them as prize have an insurable interest in them, in the voyage home for the purpose of bringing them to adjudication in the Admiralty; so that although the court of Admiralty should ultimately adjudge them to be no prize, and award restitution to the original owners, the captors are not entitled to a return of premium. The point came before the court upon a case reserved at the trial.

Boehm v.
Bell, 8 Term
Rep. 154.

Lord *Kenyon*, after argument, observed, "that if it were a legal capture, the captors were entitled; if the capture were

(a) Since the former editions of this Book, I have had an opportunity of comparing my own note of the above case with that of another gentleman at the Bar; and have thereby been enabled to give a fuller account of Lord Mansfield's argument.

C H A P. improperly made, they were liable to be called to account in the
 XIV. court of Admiralty, where they might be amerced in damages and costs. They had therefore a right to insure themselves against the decision, that might have loaded them with damages and costs. On this short ground I am of opinion that the assured had an insurable interest, that the risk was begun, and that there can be no return of premium."

Mr. Justice *Grose*.—"The whole difficulty has arisen from confounding an absolute indefeasible interest with an insurable interest. It is not pretended that the assured had the absolute property in the subject of insurance; neither need they have such property to make the policy legal; it is sufficient if they had an insurable interest: and according to what was said by Lord *Mansfield* in *Le Cras v. Hughes* they certainly had an insurable interest. If they had succeeded in the Court of Admiralty, it will be admitted that they had an insurable interest; and in case of their not succeeding there, there were events in which they might be made answerable, and against which it was competent to them to insure."

Mr. Justice *Lawrence*.—"The case turns on this short question, Whether or not the assured had an interest which they might insure? Did they mean to game? or was there not a loss against which they might indemnify themselves by a policy? I do not mean a certain but a possible loss. Now it has been shewn that this was a case in which the Admiralty might have decreed costs and damages, and that is sufficient. It might be asked in the language of Lord *Mansfield* in *Le Cras v. Hughes*, Had not the insured such an interest in the ship coming home, as to entitle them to an indemnity? I think they had, and therefore the plaintiffs are not entitled to a return of premium."

Crauford v. Hunter,
 8 Term Rep.
 13. See
 ante, p. 352.
 for another
 point.
Crauford v. Lucena,
 3 B. & P. 75.
 in the Exch.
 Ch. and

So also the commissioners appointed by the act of the 35 Geo. 3. c. 80. for the purpose of taking care and disposing of Dutch ships and effects detained in or brought into the ports of this kingdom, and who by their commission are to manage, sell, and dispose of the same to the best advantage, according to the instructions they should from time to time receive from his majesty and the privy council, have an insurable interest in Dutch ships and effects seized at sea by his majesty's ships of war, that they

they might be brought into the ports of this kingdom; they may insure in their own name, and a count in a declaration on such a policy, stating the nature of their trust, and averring that they *as such commissioners were interested* in the said ships and goods, and that the said insurance was made to and for their use, benefit, and account, as such commissioners, was, upon demurrer, holden to be good, the Court considering them in the light of trustees, consignees, or agents, in either of which characters it was conceived they had an insurable interest.

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2 New Rep.
269 in the
House of
Lords.

These causes continued to agitate *Westminster Hall* for a great number of years; and the arguments have run into considerable length, all of which, both as used at the bar and by the learned judges, are fully reported in 3 *Bos. & Puller*, 75. and by the same gentlemen in 2 *New Rep.* from p. 269 to 329. I need hardly say, when the high character of the *British* bench is considered, that these arguments contain a great mass of erudition on the subject of insurable interest. I find it quite impossible to give those arguments in this place, without swelling my work to a size which would far exceed its original design. Besides, as the *Dutch* commission is now at an end, the precise questions agitated in these causes never can arise again. I shall therefore content myself with stating the history and the event of the suits, referring the practitioner and the diligent student to the reporters.

The case was three times argued in the Exchequer Chamber, and the judgment of the Court of King's Bench was affirmed by Lord *Alvanley*, Chief Justice of the Common Pleas, Lord Chief Baron *McDonald*, *Heath* and *Rooke*, Justices; *Hotham*, *Thompson* and *Graham*, Barons, against the opinion of Mr. Justice *Chambre Hil. T. 1802.* 3 *Bos. & Pull.* 75. A writ of error was afterwards brought upon this judgment in the House of Lords; and after much argument at the bar, several questions were referred to the learned judges, a majority of whom were for affirming the judgment of the Exchequer Chamber. But some doubts having arisen in the House of Lords, as to the extent of the damages which had been given, particularly by the then Lord Chancellor (*Eryskine*), and by Lords *Eldon* and *Ellenborough*, a *venire facias de novo* was awarded in *July 1806*, which came on

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to be tried before Lord *Ellenborough* at the sittings after *Michaelmas* 1806. In the course of the discussion, which had taken place, it was pretty generally understood, that whatever differences of opinion there might be respecting the interest of the *Dutch* commissioners, the House of Lords, and all the judges were clearly of opinion, that his majesty had undoubtedly an insurable interest in the ships and cargoes taken possession of under the authority of the above-mentioned statute, therefore the Attorney General (*Gibbs*), and myself, who were of counsel for the plaintiffs, thought it our duty, under these circumstances, to take verdicts on those counts, which averred the interest to be in the King. Lord *Ellenborough* also directed the jury that in his opinion, his majesty had a good insurable interest: upon which direction the underwriters, by their counsel, tendered his Lordship a bill of exceptions. The parties agreed to carry the writ of error to the House of Lords at once, without going through the Court of Exchequer Chamber; and at last, on the 29th June 1808, the House unanimously, with the concurrence of all the judges, gave judgment for the assured, affirming the judgment of the King's Bench.

Hill and another v. Seemann, 1 Bos. & Pull. 315.

In a case in the Court of Common Pleas, where a house in *Spain*, who were indebted to the plaintiffs, had consigned goods to Messrs. *Dubois*, and indorsed the bill of lading to them, with a letter annexed, directing them to hold a part of the said cargo for the use of the plaintiffs, who upon getting such intelligence made the insurance in question, although they had given no orders for the goods, the Court held that the plaintiffs, being creditors of the house in *Spain*, raised a good consideration for the assignment; and that therefore there could be no doubt that the plaintiffs had a good insurable interest.

See Anderson v. Edie, post.

Wolfe and another v. Horncastle, 1 Bos. & Pull. 316.

So also in the same court, it was held that where a man had consigned a cargo to the Cudbear Company in *London*, and drawn bills for the amount, but transmitted the bills of lading through the plaintiffs, his general agents, to be sent to the Cudbear Company that they might insure, and he at the same time drew on plaintiffs for 300*l.* which was accepted and paid: but the Cudbear Company refused to accept the bills drawn on them, or take to the cargo, or to insure, upon which the plaintiffs made

insurance in their own name, and informed the confignor, who approved thereof; the plaintiffs were to be considered as consignees of the whole, and had a right in that character to insure for the benefit of their confignor; and that they had a clear insurable interest in themselves to the amount of 300*l*.

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But still in the construction of the act it has always been holden, that all insurances made by persons having no interest in the event, about which they insure, or without reference to any property on board, are merely wagers, destructive of the true ends for which this contract was introduced into the mercantile world; and therefore are to be considered as absolutely null and void.

See ante,
Knox v.
Wood.

Upon a motion for a new trial, Lord *Mansfield*, who had tried the cause, made the following report: This was an action brought by the plaintiff, who was a surgeon on board an *East Indiaman*, against the defendant, a passenger in the same ship, to recover a sum of 1000*l*. upon a special agreement, bearing date the 18th of *July* 1774; by which, after reciting, that "whereas" "the plaintiff had agreed to pay to the defendant the sum of" "20*l*. sterling at the next port the ship should arrive at, it was" "witnessed that he the defendant, in consideration thereof, did" "undertake that the said ship should save her passage to *China*" "that season: and in case she did not; that then he would pay" "to the plaintiff the sum of 1000*l*. at the end of one month" "after the arrival of the said ship in the river *Thames*." At the trial it appeared, that the plaintiff duly paid the amount of the 20*l*. to the defendant at the next port, in pagodas: that the vessel being delayed below the Cape and *Madras* in consequence of a miscalculation of five days in the reckoning, and the monsoons setting in earlier than usual, she lost her passage. That the plaintiff had *some goods* on board, which were liable to suffer by the loss of the season; and that whilst it was still doubtful whether the ship would or would not save her passage, the captain had applied to each of the parties, to persuade them to rescind the agreement; representing that the sum to be paid in either event would be more than the loser could afford. That the plaintiff was willing to have cancelled the agreement; but the defendant positively refused. The jury found a verdict for the plaintiff, damages 980*l*., but I gave the defendant leave to

Kent v.
Bird, Cowp.
583.

C H A P.
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move for a new trial upon the question, Whether this were not an agreement within the statute 19 Geo. 2. c. 37. and therefore void?

After this case had been fully argued at the bar,

Lord *Mansfield* said.—“ A policy of insurance is in the nature of it, a contract of indemnity, and of great benefit to trade. But the use of it was perverted by its being turned into a wager. To remedy this evil, the statute of the 19 Geo. 2. c. 37. was made; which, after enumerating in the preamble the various frauds and pernicious practices introduced by the perversion of this species of contract; and amongst others, that of gaming or wagering under pretence of insuring vessels, &c. proceeds under general words, to prohibit *all* contracts of insurance by way of gaming or wagering. Here the plaintiff gives so much to the defendant in consideration that the ship should save her passage to *China*; and if not, then, upon her returning safe to *England*, he is to receive 1000*l*. If the first of these events happened, the defendant won; but he could not lose, unless both happened. Is not this gaming? Is not this wagering? If this were allowed, all wagering policies would be turned into this form, and the act would be entirely defeated. If there is no interest in the case, it is gaming and wagering. Therefore there must be a new trial.”

From this case we find, that the principle stated by Lord *Mansfield* in *Lewis v. Rucker* is confirmed: namely, that where a man insures 2000*l*. and it turns out in proof that he has an interest to the value of a cable only, such an interest will never be allowed to operate so as to evade the statute. For in this case, it appeared in evidence, that the plaintiff had *some goods* on board; but that was held not to be an interest sufficient to justify an insurance so evidently contrary to the act of parliament.

Indeed wherever the Court can see upon the face of the policy, that it is merely a contract of gaming, where indemnity is not the object in view, they are bound to declare such policy void.

The

The plaintiffs had lent to *Lawson*, captain of the *Lord Holland East Indiaman* 26,000*l.* for which he had given them a common bond, in the penal sum of 52,000*l.* While he was with his ship at *China*, the plaintiffs got a policy of insurance underwritten by the defendant and others, which was in the following terms: "At and from *China* to *London*, beginning the adventure upon the goods from the loading thereof on board the said ship at *Canton*, in *China*, &c. and upon the said ship from and immediately following her arrival at *Canton* in *China*, valued at 26,000*l.* being the amount of captain *Patrick Lawson's* common bond, payable to the parties, as shall be described at the back of this policy; and it bears date the 16th day of *December* 1775; and in case of loss, no other proof of interest to be required than the exhibition of the said bond: warranted free from average, and without benefit of salvage to the insurer."

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Lawry and
another v.
Douglass.

At the head of the subscription was written, "On a bond as above expressed." Captain *Lawson* sailed from *China*, and arrived safe with his privilege (as it is called) or adventure, in *London*, on 1st of *July* 1777, none of the events insured against having happened. The receipt of the premium was acknowledged on the back of the policy. This case came before the court upon an action for a return of premium, on the ground that, the policy being without interest, the contract was void. This case, as far as it relates to the question of return of premium, will be considered in a future chapter; but in the course of the discussion, it became necessary to determine, whether the policy just recited was good within the statute. At the trial which came on at the sittings after *Trinity* term 1780, the Chief Justice was of opinion, that this was a gaming policy prohibited by the statute of 19 *Geo. 2. c. 37.* and a verdict was given for the defendant. His lordship, however, having expressed a doubt upon the propriety of his opinion on other points of the cause, a motion for a new trial was afterwards made, and all the questions came to be debated before the court: when the majority of the judges confirmed Lord *Mansfield's* first direction upon all the points. It is true Mr. Justice *Willis* differed from his brethren upon that occasion; the learned judge being of opinion, upon the question relating to our present inquiry, that this was not a gaming policy:

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policy: that it did not appear to him, that the parties had any idea they were entering into an illegal contract: that the whole was disclosed, and they *thought* there was an interest; this was a mistake; but it is a new point of law.

The three other judges supported their opinions upon the following grounds.

Lord *Mansfield*.—"It is certainly true, in many instances, that first thoughts are best. I am now very much inclined to my first opinion. There are two sorts of policies of insurance; mercantile and gaming policies. The first sort are contracts of indemnity, and of indemnity only; and from that principle a great variety of decisions and consequences have followed. The second sort may be the same in form; but in them there is no contract of indemnity, because there is no interest upon which a loss can accrue. They are mere games of hazard, like the cast of a die. In the present case the nature of the insurance is known to both parties. The plaintiffs say, "We mean to "game: but we give our reason for it; Captain *Lawson* owes "us a sum of money, and we want to be secure in case he "should not be in a situation to pay us." It was a hedge. But they had no interest; for if the ship had been lost, and the underwriters had paid, still the plaintiffs would have been entitled to recover the amount of the bond from *Lawson*. This then is a gaming policy; and against an act of parliament."

Mr. Justice *Asbhurst*.—"A policy of insurance ought to be a mere contract of indemnity, and nothing more; but here the money might have been paid twice, which shews decisively that this was a gaming policy."

Mr. Justice *Buller*.—"It is very clear to me that the plaintiffs ought not to recover. There was no fraud on the part of the underwriters, nor any mistake in matter of fact. If the law was mistaken, the rule applies, that *ignorantia juris non excusat*. This was a mere gaming policy without interest." Agreeably to this opinion, the rule for a new trial was discharged.

The

OF WAGER-POLICIES.

The second section of the act in question, which allows of insurances being made on private ships of war, interest or no interest, seems sufficiently clear, and requires no explanation.

The third section, by which insurances upon any merchandizes or effects from any ports or places in *Europe* or *America*, in the possession of the crowns of *Spain* or *Portugal* may be effected in the manner practised before this act was passed, seems to be obscurely worded. The learned commentator upon the law of *England* observes, that the reason of this proviso is sufficiently obvious. Notwithstanding this authority, in order to comprehend the meaning of the legislature, we must observe, that the trade from *Spain* and *Portugal*, to their respective colonies and establishments in *South America*, and the returns thereof, can only be carried on by their own subjects; and all other persons are prohibited from that trade by positive regulations of these respective states. The consequence of such a prohibition is, that all the goods and merchandizes which the subjects of this and other countries export from *Spain* and *Portugal*, must be in the names of *Spanish* subjects. So that it was absolutely necessary to make this exception (for no other proof but the policy itself can be brought); otherwise all insurances upon that branch of trade must have been entirely void. The words, however, seem to allow a greater latitude than was meant by the legislature in making such a provision, for by adverting merely to the words, insurances from any ports or places in *Europe* or *America*, belonging to *Spain* and *Portugal*, to *England* or other ports of *Europe* may be made, as if this act had never passed. Whereas by attending to the prohibition of trade just mentioned to any but the subjects of *Spain* and *Portugal*, as the commerce between these colonies and the parent countries can only be carried on by subjects, it is evident that the legislature intended rather to have said, that insurances on goods from ports belonging to *Spain* and *Portugal* in *Europe* to any ports in *America* belonging to those courts; and from such ports in *America* to such ports or places in *Europe*, shall be valid and effectual contracts, than to authorize insurances from the dominions of *Spain* and *Portugal* in *Europe* or *America*, to whatsoever place in the world the ship, in which these goods are to be carried, may happen to be destined. The words, however, certainly admit of that

Mr. Justice
Blackstone,
2 Vol. Com.
460.

CHAP. broad construction : for the place of destination is not ascer-
 XIV. tained.

Vide ante,
 p. 345.

Upon this section of the act, it may be observed, that the equitable construction of such contracts of insurance as are protected by it, seems to be, that they may be made without interest, notwithstanding the case of *Goddart v. Garrett*, above cited : since in such instances it is impossible for the person insured to bring any certain proof of interest on board.

Hitherto we have spoken merely of that part of this very salutary act, which requires, that every person making such a contract, should have an interest in that, which is the object of the insurance. Another part of it still claims our attention, that which prohibits re-assurances. What a re-assurance is ; in what cases it is prohibited ; and when it is allowable, will form the subject of the following chapter.

CHAPTER THE FIFTEENTH.

Of Re-Assurance, and Double Insurance.

RE-ASSURANCE, as understood by the law of *England*, C H A P. XV. may be said to be a contract, which the first insurer enters into, in order to relieve himself from those risks which he has incautiously undertaken, by throwing them upon other underwriters, who are called re-assurers. This species of contract has obtained a place in most of the commercial systems of the trading powers of *Europe*; and it is allowed by them at this day to be politic and legal. The learned *Roccus* has decided expressly in favour of it; and has cited many respectable authorities in support of his opinion. "Assicurator, post factam assicurationem, potest se assicurari facere ab alio assicuratore, et iste secundus assicurator tenetur pro assicuratione factâ a primo, et ad solvendum omne totum, quod primus assicurator solverit, et ista secunda assicuratio valet." By the ancient law of *France* such assurances were reckoned valid, and perfectly consistent with equity and good conscience. The author of the *Guidon* observes, that if it so happen that the insurers, after underwriting the policy, repent of their engagement, or are afraid to encounter the risk, they are at liberty to re-insure; but still they cannot prevent the insured from making his demand upon them in case of loss, for having, by their signature, promised indemnity, they cannot, by any protestations to the contrary, discharge themselves from their responsibility, without the consent of the insured. *Lewis* the Fourteenth, when, by the assistance of the famous *Colbert*, he promulgated those ordinances, which will be a lasting honour to the *French* nation, adopted the idea that prevailed when the *Guidon* was written: for by an article in that celebrated code of laws, he expressly declared, "that it should be lawful to the insurers to make re-assurance with other men of those effects, which they had themselves previously insured." It is not in *France* alone that this law prevails; for by the positive and express regulations and ordinances of *Koninberg*, *Humburg*, 2 Mag. 190. 233. 419.

Roccus de
Assicur. not.
12.

Le Guidon,
c. 2. art. 19.

Ord. Lewis
14. tit.
Assurance,
art. 20.

C H A P. *Hamburg, and Bilbao*, re-assurances are allowed to be effected, and consequently are lawful contracts.

1 Emerigon,
P. 247.

Pothier, tit.
Assurance,
No. 56.

By the passage cited from the Guidon it might be observed, that it was a distinguishing character of this species of contract, that notwithstanding a re-insurance, the first contract subsists as at first, without change or amendment. The re-insurer is wholly unconnected with the original owner of the property insured; and as there was no obligation between them originally, so none is raised by the subsequent act of the first underwriter. The risks of the insurer form the object of the re-insurance, which is a new independent contract, not at all concerning the insured; who consequently can exercise no power or authority with respect to it.

Agreeably to the laws of those countries just referred to, and consistently with the opinions of those respectable writers, whose works we have had such frequent occasion to mention, the law of *England* adopted their regulations, and permitted the underwriters upon policies to insure themselves against those risks for which they had inadvertently engaged to indemnify the insured: or where perhaps they had involved themselves to a greater amount, than their ability would enable them to discharge. Although such a contract seems perfectly fair and reasonable in itself, and might be productive of very beneficial consequences to those concerned in this important branch of trade; yet, like many other useful institutions, it was so much abused, and turned to purposes so pernicious to a commercial nation, and so destructive of those very benefits it was originally intended to promote and encourage, that the legislature was at last obliged to interpose, and by a positive law to cut off all opportunity of practising those frauds in future, which were become thus glaring and enormous.

19 Geo. II.
c. 37. s. 4.

Accordingly by the fourth section of that statute, which formed the subject of the preceding chapter, it was enacted,
“ that it should not be lawful to make RE-ASSURANCE, unless
“ the assurer should be insolvent, become a bankrupt, or die; in
“ either of which cases, such assurer, his executors, admini-
“ strators, or assigns, might make re-assurance, to the amount
“ before

“ before by him assured, provided it should be expressed in the policy to be a re-assurance,

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From this act it is apparent that all kinds of re-assurance are not prohibited; but wherever such a contract tends to the advancement of commerce, or to the real benefit of an individual, in such a case it shall be permitted. Thus in case of insolvency or bankruptcy, it is advantageous to the creditors in general, as well as to the individual, that a re-assurance should be made; for by these means the fund of the bankrupt's estate is not diminished in case of loss, and the insured has a better security for the payment of the amount of his damage, or at least a proportion of it (a). If the insurer die, it is no less necessary and beneficial to his successors, that there should be a re-assurance, than it was in the former case of a bankruptcy: because it will provide assets to satisfy the insured in case a loss should happen,

(a) Formerly, if an underwriter became a bankrupt after he had subscribed the policy, and before a loss happened, the insured was not entitled to a dividend out of the bankrupt's estate. This being found a heavy inconvenience, and a discouragement to trade, parliament was obliged to interpose, and to alter the law in this respect. The statute recited, “ that merchants and traders frequently lend money on bottomry, or at *respondentia*, and in the course of their trade, frequently cause their ships or vessels, and the goods and merchandises loaded thereon, to be insured; and that where commissions of bankruptcy have issued against the obligor in such bottomry or *respondentia* bond, or the underwriter, or assurer in such insurance, before the loss of the ship or goods, in such bond or policy of insurance mentioned, had happened, it had been made a question, Whether the obligee or obligees in such bond, or the assured in such policy of insurance, should be let in to prove their debts, or be admitted to have any benefit or dividend under such commission? which might be a discouragement to trade.” It was therefore enacted, “ that the obligee in any bottomry, or *respondentia* bond, and the assured in any policy of insurance, made and entered into, upon a good and valuable consideration, *bona fide*, should be admitted to claim; and after the loss or contingency should have happened, to prove his, her, or their debt and demands, in respect of such bond or policy of insurance, in like manner as if the loss or contingency had happened before the time of the issuing of such commission of bankruptcy against such obligor or insurer; and should be entitled unto, and should have and receive, a proportionable part, share and dividend of such bankrupt's estate in proportion to the other creditors of such bankrupt, in like manner, as if such loss or contingency had happened before such commission issued: and that all and every person and persons against whom any commission of bankruptcy should be awarded, should be discharged of and from the debt or debts, owing by him, her, or them, on every such bond and policy of insurance as aforesaid, and should have the benefit of the several statutes now in force against bankrupts in like manner, to all intents and purposes, as if such loss or contingency had happened, and the money due in respect thereof had become payable before the time of the issuing out the commission.”

19 Geo. II.
c. 32. § 2.

and

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and thus secure the estate of the deceased for the benefit of his heirs. Indeed, in both cases, the intention of the legislature seems to have been, to provide a fund for the payment of that proportion, which, in case of an insolvency, the insured will have a right to demand, in common with the other creditors; and for the payment of the whole, without prejudice to the heir, even in cases where the ancestor, at the time of his death, was in solvent circumstances.

Vide ante,
c. 14.

This act is worded in such express terms, excluding every species of re-assurance, except in the three instances of death, bankruptcy, or insolvency, that a doubt, as it should seem, could hardly be founded upon it. But as it was held, that the first clause of the statute, prohibiting insurances, *interest or no interest*, did not extend to foreign ships; so it was argued, that re-assurances made here on *the ships of foreigners* did not fall within the act. It might have occurred, however, that the first clause of the statute is qualified, and only prohibits such insurances when made *on his majesty's ships, or the ships belonging to his Majesty's subjects*: whereas the clause in question is general and without restriction; the inference from which is, that the legislature had both objects in view, and meant wholly to prohibit the one, but not the other.

Andree v.
Fletcher,
2 Term
Rep. 161.

This point came on to be considered by the court of King's Bench, in the year 1787, in the form of a special case, stating, that a re-assurance was made by the defendant on a *French vessel*, first insured by a *French underwriter at Marseilles*, who was living, and who, at the time of subscribing the second policy, was solvent.

The court (*Asbhurst, Buller, and Grose*, justices,) were unanimously of opinion, that this policy of re-assurance was void: and that every re-assurance in this country, either by *British* subjects or foreigners, on *British* or foreign ships, is void by the statute; *unless the first assurer be insolvent, become a bankrupt, or die.*

Le Guidon,
C. 2. art. 20.

There is another species of re-assurance allowed by the laws of *France*, as established by an ordinance of *Lewis the Fourteenth*, which was also taken from that ancient and excellent
French

French treatise, that has been so frequently mentioned. By this regulation, it is declared lawful for the assured to insure the solvency of the underwriter. By these means, the person insured gets rid of those fears, which he may have conceived concerning the ability of the insurers to pay, and he gains a second security to answer for the sufficiency of the first. But it is not to *France* alone that this kind of contract is restrained; for by the positive laws of many other maritime states, such re-assurances are valid and binding contracts. The *English* statute, which has been the subject of this and the preceding chapter, takes no express notice of this sort of insurance; because, in truth, I believe, it never was very much in practice in *England*: but, however, it seems clear, that such a circumstance, as the solvency of the underwriter, is not an insurable interest; that a policy opened upon such an event would be treated as a wager-policy; and would consequently fall within the statute of *George* the Second, which declares all policies made by way of gaming or wagering, to be absolutely null and void to all intents and purposes.

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Ord. of Lew.
14. tit. As-
surance,
art. 20.

1 Mag. 190.
419.

Having said thus much of re-assurances, I shall proceed to consider the nature of a double insurance, and to state the few cases that have been determined upon the subject. I treat of it in this place, because these two kinds of insurance have been sometimes confounded together, and supposed to mean the same thing: whereas no two ideas can be more distinct. We have already seen what is meant by a re-assurance. A double insurance is where the same man is to receive two sums instead of one, or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same goods or the same ship. The first distinction between these two contracts is, that a re-assurance is a contract made by the first underwriter, his executors or assigns, to secure himself, or his estate: a double insurance is entered into by the insured. A re-assurance, except in the cases provided for by the statute, is absolutely void: a double insurance is not void; but still the insured shall recover only one satisfaction for his loss. This requires explanation. Where a man has made a double insurance, he may recover his loss, against which of the underwriters he pleases, but he can recover for no more than the amount of his loss. This depends upon the nature of an insurance, and the great principles of justice and good faith. An insurance is merely a contract of indemnity

Double In-
surance.

1 Bur. 496.

19 Geo. II.
c. 37. s. 4.
1 Plack.
Rep. 416.

1 Barr. 492.

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indemnity in case of loss: it follows as a necessary consequence that a man shall not recover more than he has lost, or recover satisfaction greater than the injury he has sustained. This rule was wisely established, in order to prevent fraud, lest the desire of gain should occasion unfair and wilful losses. It being thus settled, that the insured shall recover but one satisfaction, and that in case of a double insurance, he may fix upon which of the underwriters he will for the payment of his loss, it is a principle of natural justice that the several insurers should all of them contribute in their several proportions, to satisfy that loss, against which they have all insured.

These principles have been fully declared to be law in several cases, which are now to be mentioned.

Newby v.
Reed, Sitt.
in London
in Easter
Vac. 1763.
2 Blac. Rep
416.

In the year 1763, it was ruled by Lord *Mansfield*, Chief Justice, and agreed to be the course of practice, that upon a double insurance, though the insured is not entitled to two satisfactions; yet, upon the first action, he may recover the whole sum insured, and may leave the defendant therein, to recover a rateable satisfaction from the other insurers.

Rogers v.
Davis, Sitt.
in Mich.
Vac. 17
Geo. III.
before Lord
Mansfield.

Thus also it was determined in a subsequent case at *Guildhall*. It was an action on a policy of insurance on a ship from *Newfoundland* to *Dominica*, and from thence to the port of discharge in the *West Indies*. It was a valued policy on the ship and freight; and on the goods as interest should appear. The ship sailed from *St. John's* the 17th of *December* 1775, and the plaintiff declared as for a total loss. The defendant underwrote for 200*l.* and has paid into court 124*l.* This sum was paid on a supposition, that the underwriters on a former policy should bear a share of the loss. The plaintiff had originally insured at *Liverpool* on a voyage from *Newfoundland* to *Barbadoes* and the *Leeward Islands*, with an exception of *American* captures: but the plaintiff afterwards, for the purpose of securing himself against captures, and having altered the course of his voyage, made the present insurance. The plaintiff now insisted he was intitled to receive the full amount of his insurance against the defendant, and not to any part from the *Liverpool* underwriters, because the voyage now insured was different from that insured at *Liverpool*. There was however a verdict for the plaintiff for his

his full demand, *with liberty for the defendant to bring an action against the Liverpool underwriters, if he thought fit.*

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Accordingly in the *Easter* term following, an action was brought for money had and received to the use of the plaintiff, who was the defendant in the last clause, in order to recover a contribution for the loss which the plaintiff had been obliged to pay. It was agreed by both parties to admit, that on the *London* policy (which was the subject of the former action), 2200*l.* were insured: that on the two *Liverpool* policies 1700*l.* were insured: that the merchant was interested to the amount of 500*l.* on the ship; 300*l.* on the freight; and 1400*l.* on the cargo, that the plaintiff had paid 200*l.* loss, and 47*l.* for the costs. The question was, whether the defendant was liable to contribute any thing, and what. The whole interest was 2200*l.* and the whole insurance was 3900*l.* It was insisted by the counsel for the defendant, that the insurance in *London* was an illegal re-assurance; and therefore the plaintiff might have made a good defence in an action brought against him: and if so, he could not now recover over against the defendant.

Davis v.
Gildart,
Sittings in
East. Vac.
17 Geo. III.
at Guild-
hall.

Lord Mansfield.—“The question seems to be, whether the insured has not two securities for the loss that has happened. If so, can there be a doubt that he may bring his action against either? It is like the case of two securities; where, if all the money be recovered against one of them, he may recover a proportion from the other. Then this would bring it to the question, whether the second insurance is void as a *re-assurance*. But a re-assurance is a contract made by the insurer to secure himself; and this is only a double insurance.” There was another ground taken in the cause, which is not material to be mentioned here: but upon this direction, the plaintiff had a verdict.

Although a man, by making a double insurance, shall not be allowed to recover a double satisfaction for the same loss; yet various persons may insure various interests on the same thing, and each to the whole value (as the masters for wages; the owner for freight; one person for goods, another for bottomry), and such a contract does not fall within the idea of a double insurance. There is a full case upon this subject, and a very elaborate argument of Lord Mansfield, in delivering the judgment of

1 Bar. 496.

C H A P.
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others v.
The Lon-
don Assu-
Comp.
1 Burr. 489.
2 Mac.
Rep. 103.

of the whole court of King's Bench, in which most of the questions relative to double insurances are clearly and decisively settled. In this cause the question was, Whether the plaintiff ought to recover his whole loss, or only a half? it being objected that there was a double insurance. A verdict was found for the whole, subject to the opinion of the court upon Lord Mansfield's report.

Lord *Mansfield*, in delivering the opinion of the court, began, by stating the facts, as they appeared to him at the trial.

Mr. *Meybohm* of *St. Petersburg* had dealings with Mr. *Amyand* and Company of *London*, who often sent ships from *London* to Mr. *Meybohm* at *St. Petersburg*. *Meybohm*, as appeared by the evidence, was indebted, on the balance of their accounts, to *Amyand* and Company. *Amyand* and Company sent a ship, called *The Galloway*, *Stephen Barker* master, to Mr. *Meybohm*, at *St. Petersburg*, to fetch certain goods. *Meybohm* sent the goods, and promised to send the bill of lading by the next post, but never did. Afterwards, in *August* 1756, *Amyand* and Company got a policy of insurance from private underwriters, for 1100*l.* on the ship, tackle, and goods, at and from *London* to *St. Petersburg*, and at and from thence back again to *London*: which policy was signed by several private underwriters, quite different persons from the present defendants; and of this sum of 1100*l.* thus underwritten, 500*l.* was declared to be on $\frac{1}{2}$ parts of the ship, and the remaining 600*l.* to be on goods. Between the 26th of *August* and the 28th of *September* 1756 (both included), Mr. *Amyand* insured 800*l.* more, with other private insurers: and this latter insurance was upon goods only: and was only at and from *St. Petersburg* to *London*. On the 28th, 29th, and 30th of *October* 1756, Mr. *Amyand* insured 900*l.* more with other private insurers, which last insurance was on goods only, at and from the *Sound* to *London*. So that the whole sum insured by *Amyand* and Company was 2800*l.* of which the sum of 2300*l.* was on goods, and the remaining 500*l.* was on the ship. Several letters being given in evidence, it appeared that *Meybohm* wrote from *Petersburg* on the 7th of *September* 1756 (the date of his first letter on this subject) to *Amyand* and Company; and mentioned what goods he should send to them, referring to the invoice for particulars; and directed them to get insurance there-

on, and to place the goods and the insurance to a particular account which he named in his letter; in which he also specified some iron, which was for Mr. *Amyand's* own account. This letter Mr. *Amyand* afterwards received (probably about the 27th of *October*,) and in consequence of it made the insurance accordingly, upon the 28th, 29th, and 30th of the same *October*, as before-mentioned. *Meybohm*, having shipped the goods, indorsed the bills of lading to one Mr. *John Tamez* in *Moscow* (the plaintiff, in effect, in the present action) who, on the 7th of *October* 1756, wrote to his correspondent Mr. *Uthhoff* here in *London* to insure these goods. In this letter he desires Mr. *Uthhoff* to insure the *whole*, that he (*Tamez*) might be safe in all events; for he suspected that these goods were intended to be consigned by *Meybohm* to somebody else, and perhaps might be insured by some other persons. And he says they were transferred to him, in consideration of his being in advance to *Meybohm* more than their amount. This letter from Mr. *Tamez*, with these directions to insure, was received by Mr. *Uthhoff*, on the 15th of *November* 1756. Mr. *Uthhoff* accordingly applied to the defendants, the *London Assurance Company*; and disclosed to them, at the same time, all these particulars: and they, upon the 16th of *November* 1756, after being thus apprised, *that there might be another insurance*, made the insurance now in question, for 231*l.* on the goods at and from the *Sound* to *London*. The goods were lost in the voyage. Mr. *Uthhoff's* insurance was made by the plaintiffs *Godin, Guyon, and Company*, who are insurance brokers: and they declare that this insurance was made by order of *Henry Uthhoff* esq. This declaration is indorsed upon the policy, and is dated the 18th of *November* 1756. There is no doubt as to the value of the goods, or as to the loss of them. It is admitted by the defendants, that the plaintiffs ought to recover half the loss from them: but they say they ought to pay *only half*, not the *whole* of the loss. So that the only question is, whether the plaintiffs are entitled, upon the circumstances of this case, and upon the facts I have been stating, to recover the *whole loss* from the present defendants; or only the *half* of his loss from *them*, and the remainder from the underwriters of Mr. *Amyand's* policy. The verdict is found for the plaintiff, for the whole: but it is agreed to be subject to the opinion of this court, upon the question I have just mentioned.

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First, to consider it as between the insurer and insured. As between them, and upon the foot of commutative justice merely, there is no colour why the insurers should not pay the insured the whole: for they have received a premium for the whole risk. Before the introduction of wagering policies, it was upon principles of convenience very wisely established, that a man should not recover more than he had lost. Insurance was considered as an indemnity only, in case of a loss; and therefore the insurance ought not to exceed the loss. This rule was calculated to prevent fraud; lest the temptation of gain should occasion unfair and wilful losses. If the insured is to receive but one satisfaction, natural justice says that the several insurers shall all of them contribute *pro rata*, to satisfy that loss, against which they have all insured. No particular cases are to be found on this head: or, at least, none have been cited by the counsel on either side. Where a man makes a double insurance of the same thing, in such a manner that he can clearly recover against several insurers in distinct policies a double satisfaction, the law certainly says that he ought not to recover doubly for the same loss, but be content with one single satisfaction for it. And if the same man really and for his own proper account insures the same goods doubly, though both insurances be not made in his own name, but one or both of them in the name of another person, yet that is just the same thing; for the same person is to have the benefit of both policies. And if the whole should be recovered from one, he ought to stand in the place of the insured, to receive contribution from the other, who was equally liable to pay the whole. But in this case if *Tamez* was not to have the benefit of both policies in all events, then it can never be considered as a double policy.

It has been said, that the indorsement of the bills of lading transferred *Meybohm's* interest in all policies, by which the cargo assigned was insured; and therefore *Tamez* has a right to Mr. *Amyand's* policy; and that *Tamez*, being the assignee of *Meybohm*, is the *cestui que trust* of it, and may recover the money insured; and even that he may bring trover, or detain, for the very policy itself: and it is urged from hence, that he either will or may have a double satisfaction for the same loss.

But allowing that by the indorsement of the bills of lading and assigning the cargo to *Tamefs*, he stands in the place of *Meybohm* in respect of his insurances; yet Mr. *Amyand* has an interest of his own, and had actually insured the ship and goods, to the amount of 1900*l.* (upon both together) prior to any directions or intimation received from Mr. *Meybohm*, to insure for him. Various people may insure various interests on the same bottom: (as one person for goods, another for bottomry, &c.) And here Mr. *Amyand* had an interest of his own, distinct from that of Mr. *Meybohm*: he had a lien upon these very goods as a factor to whom a balance was due. And he had the sole interest in the ship; which was a part of the things insured by him. It is far from appearing, that even his last insurance (in *October*) was made on the account of *Meybohm*, or as agent for him. So far from it, Mr. *Amyand* insists upon it for his own benefit (as he expressly declared at the trial), and absolutely refuses to give it up, or to suffer his name to be used by the plaintiff; though he was a witness for the defendants, and was produced by them, and inclined to serve them. So that the foundation of this argument, urged by the defendant's counsel, fails them; and there is, in reality, nothing to support it. But even supposing that Mr. *Amyand* had made his insurance, not upon his own account, but as agent or factor for Mr. *Meybohm*, and upon the account of *Meybohm*; yet even then *Tamefs* can never come against *Amyand*'s underwriters, or come at *Amyand*'s policy to his own use. For *Amyand*, the factor of *Meybohm*, has possession of the policy, and appears to have been a creditor of *Meybohm* upon the balance of accounts between them, at the time when he made the insurance: and I take it to be now a settled point, "that a factor to whom a balance is due, has a lien upon all goods of his principal, so long as they remain in his possession." *Kruger* and others v. *Wilcox* and others, was a case in Chancery upon this point. It came on first before Sir *John Strange*, then Master of the Rolls, who decreed an account, and directed allowances to be made for what the factor had expended on account of the ship or cargo, and reserved all further directions till after the master's report. It came on again, afterwards, for further directions, after the master's report, before the Lord Chancellor, who was attended by four eminent merchants, whom he interrogated publicly. After which he took time to consider of it; and on the first of *Febru-*

Ambler's
Rep. 252.

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ary 1755, decreed, "that the factor has a lien on goods consigned to him; not only for incident charges, but as an item of mutual account for the general balance due to him so long as he retains the possession. But if he part with the possession of the goods, he parts with his lien, because it cannot then be retained as an item for the general account." There was another case, in the same court, of *Gardiner v. Coleman*, a few months after; in which the former case, determined as I have mentioned, was considered as a point settled; and this latter case of *Gardiner v. Coleman* was decreed agreeably to it. So that Mr. Amyand, even considered as factor or agent to *Meybohm*, and as making the insurance upon *Meybohm's* account, is yet entitled to retain the policy; *Meybohm* being indebted to him upon the balance of the account between them; and he has a lien upon the policy, whilst it continues in his possession. Therefore, even in this view of the case, Mr. Tamez must first have paid to Amyand the balance of his (Amyand's) account, before he could have gotten that policy out of Amyand's hands; and consequently, Mr. Tamez was very far from being entitled to the benefit of it as a *cestuy que trust*, absolutely and entirely.

But if the question, "Whether Tamez could take the benefit of Mr. Amyand's policy?" were doubtful; yet here, Tamez insured the goods with the defendants, expressly under the declaration of his suspicion, that there might have been a former consignation, and some former insurance made upon the goods by some other person: but he desired to insure the whole for his own security; and to this the defendants agreed, and took the whole premium. Mr. Amyand insisted upon his right to the whole benefit of his own policy, when he was examined as a witness: and is now litigating it in Chancery. It would neither be just nor reasonable, that Tamez should only recover half of his loss from the defendants, and be turned round for the other half, to the uncertain event of a long and expensive litigation. I do not believe there ever will or can be a recovery by Tamez, or those who shall stand in his place, against Amyand's underwriters. However, if those underwriters are liable to contribute at all, the contribution ought to be among the several insurers themselves: but Tamez, the insured, has a right to recover his whole loss from the defendants, upon the policy now in question, by which they are bound to pay the whole. For though here
be

be two insurances, yet it is not a double insurance; to call it so is only confounding terms. If *Tamez* could recover against both sets of insurers, yet he certainly could not recover against the underwriters of *Amyand's* policy, without some expence; nor without also first paying and re-imbursing to Mr. *Amyand* the premium he paid, and also his charges. This is by no means within the idea of a double insurance. Two persons may insure two different interests; each to the whole value; as the master for wages; the owner for freight, &c. But a double insurance is where the same man is to receive two sums instead of one, or the same sum twice over for the same loss, by reason of his having made two insurances upon the same goods, or the same ship. Mr. *Tamez* is entitled to receive the whole from the defendants, upon their policy; whatever shall become of Mr. *Amyand's* policy: and they will have a right in case he can claim any thing under Mr. *Amyand's* policy, to stand in his place, for a contribution to be paid by the other underwriters to them. But still they are certainly obliged to pay the whole to him. Therefore upon these grounds and principles, in every light in which the case can be put, we are all of us clearly of opinion, that the verdict is right, as it now stands for the whole; and that the *posse* must be delivered to the plaintiff.

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In the course of what has been said upon double insurance, no notice has been taken of the laws of foreign states respecting that point: the reason of this silence is the great contrariety to be found in their laws upon the subject; it being almost impossible to mention two countries, whose regulations, as to this matter, are similar. In one the contract is absolutely void, and a forfeiture ensues: in others, if the first policy amount to the value of the effects laden, the other insurers shall withdraw their insurance, retaining one half *per cent.* and in some other countries, the double insurance is merely void, without any forfeiture being incurred. When there is such a diversity in the ordinances upon the subject, it seemed needless to enter into them, especially as the law of *England* with respect to double insurance is so clear, and so well-founded in reason and natural justice, as to require no illustration or confirmation from the laws of any other country.

Ord. of Mid-
dleb. 2 Mag.
p. 77. Ord.
of Fran. and
Stockh.
2 Mag. 172.
267.
Ord. of Billh.
2 Magens,
p. 411.

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Vide ante,
P. 2.

Having, in this and the five preceding chapters, treated of those circumstances, by which the contract of insurance is rendered void from its commencement, on account of some radical defect, which prevents the policy from ever having any operation at all, and having, in the course of that inquiry, been led into a variety of discussion, involving in it a very material part of the law of insurance: we shall proceed to shew in what cases the policy, although not void *ab initio*, is rendered of no effect, because the insured has not himself fully complied with those conditions, which he has either *expressly* or *tacitly*, from the nature of his contract, undertaken to perform. It was indeed observed in the first chapter of this work, that although the policy is not subscribed by the insured, yet there are certain conditions to be performed on his part, with as much good faith and integrity as if his name appeared at the foot of the policy: otherwise it is a dead letter, and he can never recover an indemnity for any loss, which he may happen to sustain.

CHAPTER THE SIXTEENTH.

Of Changing the Ship.

OF those causes which will operate as a bar to the insured's recovering upon a policy of insurance against the underwriter, the first to be mentioned is that of changing the ship; or, as it has commonly been called, changing the bottom. This will require but very little discussion. We formerly said, that, except in some special cases of insurances upon *ship or ships*; it was essentially requisite to render a policy of insurance effectual, that the name of the ship, on which the risk was to be run, should be inserted. That being done, it follows as an implied condition, that the insured should neither substitute another ship for that mentioned in the policy before the voyage commences, in which case there would be no contract at all: nor during the course of the voyage remove the property insured to another ship, without the consent of the underwriter, or without being impelled by a case of unavoidable necessity. If he do, the implied condition is broken, and he cannot recover a satisfaction, in case of a loss, from the insurer; because the policy was upon goods on board a particular ship, or upon the ship itself; and it becomes a material consideration in a contract of insurance, upon what vessel the risk is to be run; since the one may be much stronger, and more able to resist the perils of the sea; or by its swift sailing, much better able to escape from the pursuit of an enemy, than the other.

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Vide ante,
c. 1.

Malynes, it is true, in his *Lex Mercatoria*, appears to be of a different opinion; for he says, "It sometimes happens, that upon some special consideration, this clause forbidding the transferring of goods from one ship to another is inserted in policies of assurance; because in time of hostility or war between princes, it might be unladen, in such ships of those contending princes, by which the adventure would be increased. But according to the usual insurances which are made generally without an exception, the assurer is liable thereunto; for it is understood, that the master of a ship,

Mal. Lex
Merc. 118.

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“ without some good and accidental cause, would not put the goods from one ship to another, but would deliver them, according to the charter-party, at the appointed place.” The reason given by *Malynes*, in support of his position, is by no means satisfactory, nor is it well founded in point of experience: neither has he adduced a single authority to corroborate the opinion advanced. Indeed, the whole current of authority turns the other way: at least, as far as I have been able to trace it.

Molloy, l. 2,
c. 7. § 11.

Molloy has said, that if goods are insured in such a ship, and afterwards in the voyage she becomes leaky and crazy, and the supercargo and master, by consent, become freighters of another vessel for the safe delivery of the goods; and then after she is loaded, the second vessel miscarries, the assurers are discharged. It is true, the sentence proceeds thus: “ If these words be inserted, namely, *the goods laden to be transported and delivered at such place by the said ship, or by any other ship, or vessel, until they be safely landed*, the insurers must answer the misfortune.” But this does not at all affect the general rule before laid down; for it only goes to shew that, which is not denied, that the parties may take a case out of the general rule of law, by a special agreement: and the exception proves the truth of the first proposition. Besides, in such a case, it should seem that the ship, in which the goods are laden, ought not to be changed, but upon necessity.

*Roccus de
Asscurat.
No. 23.*

This opinion is confirmed by foreign writers. “ *Merces si eadem navigatione transferantur de unâ navi in aliam, et si novissima navis, ubi merces transfusæ fuerunt, deperdatur, tunc est inspicienda forma asscurationis, in quâ si fuit dictum, quod asscurentur merces, quæ sunt in tali navi, tunc asscurator non tenetur, eo quod mentionem fecit in asscuratione de tali navi. Et ratio est, quia non par est ratio asscurationis, quando merces debeantur in unâ navi, et quando in alterâ; imo solet id principaliter considerari inter ipsos asscuratores, cum una navis sit magis fortis quam alia.*” *Roccus* is corroborated by several learned writers upon this branch of jurisprudence.

*Santer, de
Asscurat.
p. 3. n. 35.
Stracca gloss.
2. n. 10.*

In the law of *England*, there is only one case to be met with in print upon the subject; and that is not expressly in point to the

the present inquiry, although it seems to decide it. It was a case which came on at *Guildhall* before Lord Chief Justice *Lee*. The plaintiff had insured interest or no interest on *any ship* he should come in from *Virginia* to *London*, beginning the adventure on his embarking on board such ship; the money to be paid though his person should escape, or the ship be retaken. He embarked on the *Speedwell*; but she springing a leak at sea, he went on board the *Friendship*, and arrived safe at *London*; but the *Speedwell* was taken after he left her. And now, in an action against the underwriter, he was held liable; for the insurance is on the ship the plaintiff set out in: *and had that got safe home and the other been lost*, the plaintiff could not have recovered upon the ground of having removed his person into that ship in the middle of the voyage.

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Dick v. Barrell, a Str. 1248.

From this case it appears, that although no ship was named in the policy, yet the moment the ship was ascertained by the embarkation of the insured, the contract was at an end, provided the second ship had been lost; for so the words in *Italics* expressly import. *A fortiori*, therefore, the insured could not be entitled to recover, upon a change of the bottom, when the name of the vessel is expressly mentioned in the very instrument by which the contract is effected. And although the insured, notwithstanding the change of bottom, recovered in the case cited from *Strange*; it may be accounted for in two ways, consistent with the doctrine advanced in this chapter. In the first place, it was a gaming policy, interest or no interest; and the plaintiff was entitled to recover the moment the ship was taken, although he might perhaps not be interested at all; or perhaps the effects insured might be left in the first ship, although the plaintiff removed his person; in which case even at this day, upon a fair *bond fide* policy, he would be entitled to recover from the underwriters a satisfaction for the loss he had sustained.

The general doctrine relative to changing the bottom of the ship was alluded to by Lord *Mansfield*, when delivering the opinion of the court in the case of *Pelly* against the *Royal Exchange Assurance Company*, which has already been fully reported in a preceding chapter. "One objection," said his Lordship, "was formed by comparing this case to that of "changing the ship or bottom, on board of which goods are

Vide ante,
c. 2. p. 55.
1 Burr. 351.

"insured:

C H A P. "insured: *which the insured have no right to do* (a). For there
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 "that case is not like the present."

From this passage it is evident, that Lord *Mansfield* intended to confirm the principle advanced in this chapter, namely, that when an insurance is made on a specific ship, and the insured not being impelled by any necessity, without the consent of the underwriter, changes the ship in the course of the voyage, he has not kept his part of the contract, and cannot recover against the underwriter.

(a) This is to be taken as a rule, subject to the exception of inevitable or urgent necessity: for it has been held, that the owners of goods insured, by the act of shifting the goods from one ship to another, do not preclude themselves from recovering an average loss arising from the capture of the second ship, if they act from necessity, and for the benefit of all concerned. See *Plantamour v. Staples*, 1 Term Rep. 611. note (a) and ante, chap. 1.

CHAPTER THE SEVENTEENTH.

Of Deviation.

DEVIAION, in marine insurances, is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the specific voyage insured. Whenever a deviation of this kind takes place, the voyage is determined; and the underwriters are discharged from any responsibility. It is necessary, as we have seen, to insert in every policy of insurance, the place of the ship's departure, and also of her destination. Hence it is an implied condition to be performed on the part of the insured, that the ship shall pursue the most direct course, of which the nature of things will admit, to arrive at the destined port. If this be not done; if there be no special agreement to allow the ship to go to certain places out of the usual track; or if there be no just cause assigned for such a deviation; it is but just and reasonable that the underwriter should no longer be bound by his contract, the insured having failed to comply with the terms on which the policy was made. For if the voyage be changed after the departure of the ship, it becomes a different voyage, and not that, against which the insurer has undertaken to indemnify: (which is the true objection to a deviation) the risk may be ten times greater, which probably the insurer would not have run at all, or at least would not, without a larger premium. Nor is it at all material, whether the loss be or be not an actual consequence of the deviation; for the insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. Neither does it make any difference, whether the insured was, or was not, consenting to the deviation.

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Vide ante,
c. 1.

Roccus,
Not. 52.

Dougl. Rep.
288.

These principles have been established by many decisions in the various courts of *Westminster Hall*; and also by a solemn determination in the House of Lords.

The plaintiff was a shipper of goods in a vessel bound from *Dartmouth* to *Liverpool*: the ship sailed from *Dartmouth*, and put into *Loo*; a place *she must of necessity pass by*, in the course of the insured voyage. But as she had no liberty given her by the policy

Fox v.
Black, Esq.
at assizes,
1767, before
Mr. Justice
Yates.

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policy to go into *Loo*, and although no accident befel her in going into, or coming out of *Loo* (for she was lost after she got out to sea again), yet Mr. Justice *Yates* held that this was a deviation, and a verdict was accordingly found for the underwriters.

Townson v.
Guyon, be-
fore Lord
Mansfield.

In another case, an action was brought upon a policy on goods and other merchandizes, loaded on board the ship called the *Charming Nancy*, from *Dunkirk* to *Leghorn*. The ship came to *Dover* in her way to procure a *Mediterranean* pass; and was afterwards lost.

Lord *Mansfield* was of opinion, that the calling at *Dover* was a deviation; and the plaintiff was nonsuited.

Smith v.
Surridge,
4 Esp. 25.

It was also held by Lord Chief Justice *Lee*, that if the master of a vessel put into a port not usual, or stay an unusual time, it is a deviation, and discharges the insurer. But the time which a ship is detained in the port for necessary repairs, the insurance being *at and from*, shall not be considered *unnecessary delay* so as to avoid the policy. Lord *Kenyon* said, the policy attached on the ship while she was undergoing repairs; it was in such a case not necessary that she should be fit to proceed on the voyage at the time of the insurance. The underwriter took into his consideration the time she might be necessarily detained.

Stitt v War-
del, sittings
at Guildhall
after Mich.
1797.

It has also been held that even where there is a permission given to *touch and stay* at a place, that confers no privilege on the assured to *break bulk*, or to unload any part of the cargo. The case which was so decided was an insurance on goods at and from *Whitehaven* to *St. Michael's*, with liberty to touch and stay at any place or places whatsoever, and *particularly at Cork in her passage out*. The ship was driven by stress of weather into *Dublin*, and there she unloaded a great part of the coals, of which her cargo consisted, and then proceeded on her voyage and was lost.

Lord *Kenyon*, C. J. was of opinion that as the liberty given was only to *touch and stay*, but not *to trade*, the unloading and selling the coals, though the ship was not further delayed thereby, was a *breaking bulk*, and avoided the policy: and upon being asked by the plaintiff's counsel, his lordship said, he should have been of the same opinion, if this *breaking bulk* had happened at *Cork*; and the plaintiff was nonsuited.

So

So a vessel having liberty to *discharge* goods at *Lisbon*, is not at liberty to *take in* any there, although there be a return of premium if she sails thence with convoy, and only waits till convoy is ready.

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Sheriff v.
Potra. Sit.
after M.T.
1803.

The two cases upon this subject just referred to, though the decisions of two most eminent judges, were never brought under the review of the Court. But in a subsequent case they were very considerably shaken, although in the case about to be quoted, the insurance was upon *ship and freight*, and not upon *goods*; and Lord *Ellenborough* expressly reserved his opinion upon any case of insurance *on goods* till the point should arise. In the case now to be mentioned, which was an insurance at and from the ship's loading ports on the coast of *Spain* to *London*, with liberty to touch and stay at any port or place whatsoever, the jury found expressly, that the going into, and staying at *Gibraltar* was of necessity, in order to procure a supply of provisions, and that the stay was not longer than the necessity required: and it was proved that, while the vessel lay there, the captain received on board some chests of dollars. This fact, and this finding of the jury raised the question of law, whether the taking in the additional cargo of dollars was a breaking of bulk in the course of the voyage, at a place *where there was no liberty to trade* given by the policy, so as to avoid it, as increasing, or having a tendency to increase the risk. The point was very fully argued; and the counsel, who argued that this amounted to a deviation, relied on the two cases last quoted.

Raine v.
Bell, 9 East,
195.

But the Court were unanimous in deciding, (and they delivered their opinions *seriatim*;) that as the jury had found that the whole period of the ship's stay was covered by the necessity which originally induced her to go into *Gibraltar*, there was no implied warranty in such a policy that the ship shall not trade, so as no delay be actually occasioned. And as to the temptation to deviate held out to the master, that must always be a question for the jury, as in other cases of fraud, whether the deviation or delay arose from the trading or from necessity: and an *intention* to deviate, not carried into effect, will not avoid a policy, still less can a *temptation* to deviate avoid it.

The

C H A P. XVII. The next case to be reported underwent a variety of discussion in the several courts in *Scotland*; and in all of them judgment was given against the underwriters: but upon an Appeal to the House of Lords, the various decrees of the courts below were reversed, agreeably to those principles adduced in the beginning of this chapter, and which have been uniformly admitted as sound law.

Elliot and
others v.
Wilson and
Co. 7 Bro.
Parl. Cases,
p. 459.

The harbour of *Carron*, situate near the head of the *Firth of Forth*, is chiefly resorted to by ships in the service of the *Carron Company*, who have a great iron work and considerable collieries in the neighbourhood. From thence vessels, intended principally to convey the manufactures of the Company, their coals, and such goods as may be offered them on freight, sail periodically for *Hull*, and other places on the *Eastern coast of England*. This is a coasting or carrying trade, the vessels in going down the *Firth* touching at different places to take in additional loading, or to discharge part of what they have received at places higher in the river. Particularly it is usual for these vessels to call at *Borrowstowness* and *Leith*, and at *Morrison's Haven*, a port six miles farther down the *Firth*, and on the same side with *Leith* in the bay of *Prestonpans*. In *February 1774*, the respondents had occasion to ship fourteen hogheads of tobacco on board one of these vessels for *Hull*; and desiring to insure them, gave the following instructions in writing to *Hamilton and Bogle*, insurance brokers in *Glasgow*: "Please to insure for our account by the *Kingston*, *George Finlay*, master, from *Carron* to *Hull*, with liberty to call as usual, fourteen hogheads of tobacco;" and these instructions were entered in the brokers' books for the perusal of the underwriters, as is the practice at *Glasgow*. Upon the 9th of *February*, the appellants underwrote a policy of insurance in these terms: "beginning the adventure of the said tobacco, at and from the loading thereof on board the said ship *Kingston* at *Carron* wharf, and to continue and endure until said *Kingston* (being allowed a liberty to call at *Leith*) shall arrive at *Hull*, and there be safely delivered." The respondents were not privy to the allowance to call at *Leith*, being thus substituted in the policy for the more general term, *as usual*, mentioned in the instructions to the broker. The premium agreed on was 1*l.* 5*s.* per cent. a rate equal, at least, if not higher, than

was usual to be given in the voyage, in cases where it was understood, or expressed in the policy, that the vessel might touch at the customary ports. And in particular some of these appellants in *February* 1772, underwrote a policy upon this very vessel, and for the same voyage, with liberty to call at *Leith* and *Morrison's Haven*, at a premium of one *per cent.* only. The vessel thus insured had sailed from *Carron* five days before the date of the policy, that is, on the 4th of *February* 1774, it did not call or touch at *Leith*, but put into *Morrison's Haven*: set sail from thence on the 9th, got safe into the direct course from *Carron* to *Hull*, cleared the *Firth* of *Forth*, and proceeded with a fair wind, till on the evening of the 10th the vessel, being overtaken by a storm at *Holy Island*, on the coast of *Northumberland*, was wrecked and the cargo totally lost. All these were facts admitted; nor was it alleged by the appellants, that the ship received the smallest damage in going into or coming out of *Morrison's Haven*. Intelligence of this misfortune reached *Glasgow* on the 14th of *February*, when the respondents for the first time saw the policy of insurance, or understood that it differed in terms from their instructions to the broker, in whose hands it remained. It did not, however, occur to them, that this slight variation would afford a pretext to the underwriters for refusing payment: nor does it seem to have then occurred to those gentlemen, who wrote immediately to the respondents, desiring they would request the *Carron* Company to give the necessary orders for preserving the tobacco, and forwarding it to *Hull*, promising to contribute towards the expence, so far as they were interested. Upon the 24th of *February*, however, the appellants, in an instrument drawn by a publick notary, protested against the ship's having gone into *Morrison's Haven*, as a deviation from the terms of the policy, which only contained a liberty to call at *Leith*; and absolutely refused payment of the loss. On this refusal, the respondents brought their action against the appellants in the court of admiralty in *Scotland*, the only competent court for determining questions about insurances, and other maritime affairs in that country, in the first instance. The appellants put in their defence, which was followed by other pleadings, in *January* 1775, the Judge Admiral pronounced the following interlocutor (or decree): "Having considered the whole circumstances of this case, and in particular that it is not alleged by the defenders, that the pursuers were in the knowledge of the ship the King-

" *ston*

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"*Jon* being intended to put into *Morrison's Haven*, he repels the defence pleaded by the defenders." The appellants reclaimed against this interlocutor (petitioned for a review of the sentence), and answers being put in to their petition, the Judge Admiral, because they set forth, and seemed to found on conversations between them and the brokers, at the time of underwriting or settling the terms of the policy, allowed them to bring proof of what passed at and previous to making the insurance. But the appellants presented a second petition, declining to go into any proof, insisting that the cause turned singly upon the words of the policy, and demanding judgment on the abstract question, whether the vessel touching at *Morrison's Haven*, when not allowed by the policy, discharged the underwriters? whereupon the Judge again decreed in favour of the respondents. The appellants then sued out a writ of suspension from the Court of Session, of these sentences of the Judge Admiral; and after the usual preliminary step of procedure before the Lord Ordinary, the cause being reported to the whole bench of Lords, their Lordships having before them the opinions of several of the most eminent merchants both in *England* and *Scotland*, gave judgment for the respondents, in the month of *January* 1776, in the following terms: "Having advised informations, *hinc*, *inde*, and considered the policy of insurance and the whole circumstances of the case, the Lords repel the reasons of suspension, find the letters orderly proceeded," (that is, that the appellants were obliged to pay the sums underwritten, in terms of the Judge Admiral's decree,) "and their Lordships decree accordingly." The appellants having also reclaimed against this interlocutor, it was, in *March* 1776, finally confirmed. From these several decrees the present appeal was brought; and the House of Lords were of opinion, that a wilful deviation from the due course of the insured voyage, is in all cases a determination of the policy; that, from that moment, the engagement between the insurers and insured is at an end; that it is immaterial from what cause, or at what place, a subsequent loss arises, the insurers being in no case answerable for it: that the going into *Morrison's Haven* was a wilful deviation from the due course of a voyage from *Carron* to *Hull*; that though it may be true, as contended on the part of the respondents, that ships sailing through the *Frith of Forth* have sometimes been permitted by the terms of a policy, underwritten at the same premium as the

present, to go into that port, it could not avail in the present case, since the policy in question had given no such permission. It was therefore ORDERED AND ADJUDGED that the interlocutors complained of should be reversed.

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In a late case upon a policy of insurance on a ship "*at and from Fisherow to Gottenburgh, and back to Leith and Cockenzie*," it appeared that in the homeward voyage she went *first* to *Cockenzie*, which lay nearer to *Gottenburgh* than *Leith*, and was stranded in the harbour of *Cockenzie*. There was a good deal of evidence given to shew that *Leith* harbour was the safer of the two; but the jury seemed to be of opinion, according to a note taken by Lord *Kenyon* at the time, that the construction of the policy was to be made by attending to the order in which the places were named in it. The jury, however, by consent of parties, to save the expence of going to trial again, found a verdict for the plaintiff, with permission to enter a verdict for the defendant, if the court should agree that the above construction was the true one. The case came on to be discussed in court; and they were of opinion, that unless there be some usage proved, or some special facts to vary the general rule, the party insured must go to the several places mentioned in the policy, in the order in which they are named; and that to depart from that course is a deviation: and one of the Judges added, that the parties by inserting the names contrary to the *natural* order of the places, shewed it to have been the intention of the parties to vary the natural course of the voyage. A verdict was entered for the defendant.

Bratton v.
Haworth.
6 Term Rep.
531.

In the argument of the preceding case, another was quoted by one of the learned Judges, as having been decided before Lord Chief Justice *Lee*, where in an insurance on the *Gothic Lyon* at and from London to her ports of discharge in the Streights as high as *Messina*, his Lordship was of opinion, as she did not stop at *Marseilles* (for which place she had a cargo) in her way to the Streights, but meant to take it in her return, that this was acting contrary to the terms of the policy: for by her ports of discharge, must be understood such ports as it was intended goods should be delivered at, and the first of these was *Marseilles*.

Clafon v.
Simmond, at
Guildhall,
Hil. Sittings
174r.

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Hogg. v.
Horner, Sitt.
at Guildhall
after Mich.
Term, 1797.

So in a very late case, where a ship was insured "at and from
" *Lisbon* to a port in *England*, with liberty to call at any one port
" in *Portugal* for any purpose whatever: and where the ship
had sailed from *Lisbon* to *Faro* to complete her loading, *Faro* being
a port to the southward of *Lisbon*; consequently lying directly
out of the course of the voyage to *England*: Lord *Kenyon* was of
opinion that the liberty, given by this policy, must be restrained
to a permission to call at some port to the northward of *Lisbon*,
in the course of the voyage to *England*; and that by going to the
southward the assured had been guilty of a deviation.

These cases seem clearly to have decided that where several
termini are mentioned in a policy of insurance, as the objects of
the assured, those ports must be gone to in the order in which
they are mentioned in the policy, otherwise the assured will be
guilty of a deviation. But it was lately endeavoured to apply
the principle of those cases to one, which it was considered by
the court, did not interfere with those previously before them for
judgment.

Marlton v.
Reid,
3 Felt's R.
572

It was an action on a policy on goods on board *the Franklyn*,
at and from *Liverpool* to *Palermo*, *Messina*, *Naples*, and *Leghorn*.
The ship took in goods and was cleared out for *Naples* only,
and had no goods on board for any other place, *Leghorn* being
known to be in the hands of the *French* soon after the policy was
effected. The ship was captured in the Bay of *Biscay* by the
French, and consequently before the dividing point, to any of
the places mentioned in the policy. The plaintiff recovered a
verdict. A new trial was moved for on two grounds, one of
which only is material here, namely, that there was no inception
of the voyage insured, which was to *Palermo*, *Messina*, and
Naples, in the order in which they stand in the policy, as in
Beatson v. Haworth: whereas here it appeared that the vessel
never intended to go to *Palermo* or *Messina*, but only to *Naples*
for which place she took in her loading and cleared out.

Supra 393.

Lord *Ellenborough* said, "This is not a question of deviation;
to raise which, it must be assumed that the voyage insured was
commenced, and that the ship afterwards went out of her track,
on that voyage; but there is no question of that sort here; the
loss

loss happened before the dividing point, to any of the places named in the policy : the only question is, whether there were any inception of the voyage insured ? and I am clear that there was. I think that the voyage insured to *Palermo, Messina, and Naples*, meant a voyage to all, or any of the places named ; with this reserve only, that if the vessel went to more than one place she must visit them in the order described in the policy. The assured must only not invert the order of the places, as they stand in the policy. And that was in truth all that was decided in the case of *Beatson v. Haworth* ; where it must be remembered that the vessel had taken in goods for both the places named, *Leith* and *Cockenzie*, and it was assumed that she put into *Cockenzie*, first, in her way to *Leith*, where she was to discharge the rest of her cargo.

Mr. Justice *Lawrence*.—Why are we to suppose that the underwriters meant to stipulate that at all events the ship should take the *circuitous* instead of the *direct* course ? Is it not rather to be presumed, that if the question had been put to the underwriters, whether they meant to insist that the ship should go round by each of the places named to *Naples*, they would have answered in the negative, because, if she went the direct course to *Naples*, it would lessen their risk. It is admitted at the bar, that if the ship had cleared out for the first place named in the policy, the risk would have commenced, although there had been no intention of prosecuting the voyage further. Then there is an end of the objection, that the voyage commenced is not identified with the voyage insured. And *Beatson v. Haworth* only decided that if the ship go to more than one of several places named in the policy, she must take them in the order in which they stand. The two other judges concurred.

These principles being once established, it follows, as a necessary consequence, that however short the time of deviation may be, if only for a single night, or even for an hour, the underwriter is equally discharged, as if there had been a deviation for weeks or months ; for the condition being once broken, no subsequent act can ever make it good.

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Cock v.
Townson,
C. B. before
Ld. Camden,
Ch. Just.

The ship *George* was bound from *Cork* to *Jamaica* with a convoy in the course of a war : the captain, in concert with two other vessels, took advantage of the night, and being ships of force, cruised, and thereby deviated out of the direct course of their voyage, in hopes of meeting with a prize. Lord Camden clearly held, and a special jury of merchants, agreeably to his directions, determined, that from the moment the *George* deserted or deviated from the *direct voyage* to *Jamaica*, the policy was discharged.

In a modern case, however, it seemed to be the general opinion of Lord *Mansfield*, and a special jury, and was sworn to be the usage, by several witnesses, that if a merchant ship carry letters of marque, she may *chase* an enemy, though she may not *cruise*, without being deemed guilty of a deviation.

Jolley v. Walker, at
Guildhall,
East Vac.
1781.

This was an insurance on goods and the ship *Mary* from *London* to *Cork* and the *West Indies*, and the ship was warranted to proceed on that voyage with 60 men, and equipped with 22 guns, 18 and 6 pound shot, and sheathed with copper. The question was, whether a ship having letters of marque could chase an enemy's ship without being said to have deviated? The facts were that the ship sailed with letters of marque on board against the *French*, *Spaniards*, and *Americans*, and was ordered not to cruise; but to proceed direct on her voyage to the *West Indies*; but in the event of her meeting or coming within sight of any ship belonging to the enemy, she was to chase, take, and make prize of such enemy's ship, if in her power. In the 26 *December* 1780, in latitude 14. 22 N. and longitude 40. 52 W. at midnight, a sail was discovered, whereupon the *Mary* gave chase, and on such vessel's perceiving the *Mary*, she hauled her wind to the northward, and the *Mary* hauled up after her, and at one o'clock lost sight of her; but the *Mary* still stood to the northward, and at five A.M. saw such vessel again on the lee-bow two miles off. The chase was renewed, and at six A.M. the *Mary* came up within three-quarters of a mile of the vessel, when she hoisted *Spanish* colours, and at half past seven the *Mary* came up within pistol shot and began to engage, which engagement continued till ten o'clock, when the *Spanish* vessel sheered off, leaving the *Mary* much disabled. She afterwards steered her course

to the westward and was taken on the 5th of *January 1781*, by an *American privateer* (a). It was agreed on all hands, that a ship, in such circumstances, might not cruise; and several witnesses spoke to the usage and practice of ships, which carried letters of marque, chasing an enemy. It was admitted on the part of the insurers, that if an enemy came in the way, the ship must defend or engage; but contended, that if the letter of marque lost sight of the enemy, that was no longer chasing, but cruising. Lord *Mansfield* left it upon the evidence to the jury, who found for the plaintiffs.

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Where a merchant ship, employed in commercial objects, was insured *with or without letters of marque*, with a liberty to *chase, capture, and man prizes*, the captain is not justified, after he has captured a vessel, in the further prosecution of his voyage, in *shortening sail and lying to*, in order to let the prize keep up with him, for the purpose of protecting her, as a *convoy* into port, in order to have her condemned, though such port be within the voyage insured; for that would be to extend the meaning beyond what the parties have themselves expressed, by giving them leave to *convoy*, as well as to *chase, capture, and man*, which words alone extend the rights of the assured beyond the common terms of indemnity in the policy.

Lawrence v.
Sydebotham.
6 East 45.

But in another case, which was also the case of an insurance on a commercial adventure, at and from *Liverpool to Africa, &c.* *with or without letters of marque*, it became a question, whether those words enabled the ship to *chase* for the purpose of hostile attack and capture, all vessels whensoever or wheresoever described, provided the original pursuit commences from a point in the course of the voyage, without suspending or superseding wholly the objects, destination and limits of the commercial adventure described in the policy: or whether they are to be confined to a leave to employ force for the purpose of *defence* (including a liberty of attack and chase,) only so far as they may fairly be supposed to promote ultimate security. The court were of opinion that the case of *Jolly v. Walker* did not afford any con-

Parr v.
Anderson.
6 East 202.

(a) The facts of this case are now more accurately stated than they were in former editions, as they were communicated by Lord *Ellenborough* to the court, from the original brief, which he had obtained, when he delivered his opinion in *Parr v. Anderson*.

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struction of a policy containing the liberty in question, inasmuch as that policy contained no such liberty. Therefore in the absence of any determination on the effect of such words, the court sent the case to a second trial, in order to ascertain, as a question of fact, in what manner the parties to such contracts have acted upon them in former instances, by paying losses, where deviations of the kind now in question have happened; and whether they have as yet obtained in use and practice, as between assured and assurers, any and what known and definite import.

Stillhall,
March 6,
1805.

This case came on to be tried again before Lord *Ellenborough* and a special jury. From my memory of what passed, having been one of the counsel in it, aided by a note which I have seen, his Lordship was strongly of opinion on the evidence, that this vessel had cruized, which of course, if the jury so thought, would put an end to the question. The jury found for the defendant; and I have no doubt upon that ground, from the evidence of the plaintiff's own witnesses.

Perre v.
Ward.
v. Campbell,
N. P. 263.

Consistently with this principle, that the court will not extend the meaning of a licence beyond what the parties have themselves expressed, where leave was granted by the policy to a merchant ship engaged on a fishing voyage to *cruise for, chase, capture, man, and see into port any ship or ships of enemies*, Lord *Ellenborough* was of opinion that such a permission did not authorize the ship to remain in port till a prize receives necessary repair, which she could not have had otherwise: at most she might have entered the port with the prize, seen her safely moored, and perhaps have stopped a reasonable time to give directions for proceeding on the final destination. For if the captor were permitted to stay till the prize was repaired, the voyage might never terminate, for on leaving *St. Catharine's* (the port to which this prize had been carried) another prize might have been taken, standing equally in want of repairs; afterwards a third, and so on in an infinite series. This therefore, said Lord *Ellenborough*, turns out to be a risk, which the defendant did not underwrite.

Math v.
Byron.
6 Term R.
379. 1798.
p. 120.

In a case which came before the Court of King's Bench upon a motion for a new trial, the Judges were unanimously of
opinion,

opinion, that if the assured, without the knowledge of the underwriters, take out a letter of marque (but without a certificate, which by the prize act of the 33 Geo. III. ch. 66. s. 15. is absolutely necessary to its validity), for the purpose of inducing the seamen to enter, and without any intention of cruising, this does not so essentially vary the risk as to avoid the policy.

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The doctrine that a voluntary deviation from the voyage insured vitiates the policy, has been held to be applicable to an insurance upon *freight* as well as to an insurance upon ship and goods.

Thus in a case upon a policy of assurance on *freight* of the ship *Betbiab* at and from *Bourdeaux* to *Virginia*, warranted *American* ship and property: the declaration alleged that the ship was an *American* ship and the property of *American* subjects. The plaintiff proved the ship to be *American*, and it was to have been contended upon the part of the defendant, that the warranty extended to the goods on board as well as to the ship: but upon the evidence it appeared that the goods, whether *American* or not, were to be carried in the ship from *Bourdeaux* to *Saint Domingo*, and that she was only to call at *Norfolk* in *Virginia* for orders; this rendered it unnecessary to discuss or decide the question upon the construction of the warranty, Lord *Kenyon* being of opinion, that the underwriters upon this policy had a right to expect that the goods, upon which the freight was payable, were consigned to *Virginia*, and that if the freight was payable for the carriage of them from *Bourdeaux* to *Saint Domingo*, the underwriters were not liable for the loss, though the ship was to call at *Norfolk* for orders, the freight payable being in such case different from the freight insured: plaintiff was nonsuited, and no application was made to set it aside.

Murdock v.
Potts, Sitt.
at Gallehall
after Trin.
T. 1795.

But though the consequences of a voluntary deviation are fatal to the validity of the contract of insurance, yet wherever the deviation arises from necessity, force, or any just cause, the underwriter still remains liable, although the course of the voyage is altered.

Roccus,
Not. 52.

This rule is illustrated by the following case. The ship *Mediarrangan* went out in the merchants' service with a letter of

Elton v.
Brogden,
2 Str. 1264.

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Vide ante,
p. 115.

marque, and bound from *Bristol* to *Newfoundland*, insured by the defendant. In her voyage she took a prize, and returned with it to *Bristol*, and received back a proportional part of the premium. Then another policy was made, and the ship set out, with express orders from the owners, that if another prize was taken, the captain should put some hands on board such prize, and send her to *Bristol*; but that the ship in question should proceed with the merchants' goods. Another prize was taken in the due course of the voyage, and the captain gave orders to some of the crew to carry her to *Bristol*, and designed to go on to *Newfoundland*: but the crew opposed him, and insisted he should go back, though he acquainted them with his orders; upon which he was forced to submit, and on his return his own ship was taken, but the prize got in safe. And now in an action against the underwriters, it was insisted, that this was such a deviation as discharged them. But the Court and jury held, that this was excused by the force upon the master, which he could not resist; and therefore fell within the excuse of necessity, which had always been allowed. So the plaintiff had a verdict for the sum insured.

Scott v.
Thompson,
1 New Rep.
181.

So also on a limited policy against *sea-risk and fire only*, in the course of the voyage insured from *Liverpool* to *Amsterdam*, the ship was carried out of the course of the voyage into *Falmouth* by a king's ship, but being afterwards released, she proceeded towards her destination, and the cargo, which was the subject of the insurance, sustained sea-damage, the underwriters were held liable; for the deviation, which was insisted on as matter of defence, was not voluntary: and deviation occasioned by force, and deviation by necessity are the same; for necessity is force. The case of *Elton v. Brogden* was cited by the Lord Chief Justice (Sir James Mansfield), and also another case of *Driscoll v. Passmore*, 1 Bos. & Pull. 209 and 313, in the course of the argument.

Roccus, 52.
Santer de
Assicur.
part 3. n. 52.

The general writers upon this subject have enumerated the various circumstances, which will operate as a justification to the insured, for leaving the direct tract of the voyage, upon the ground of necessity and reasonable cause: such as to repair his vessel, to escape from an impending storm, or to void an enemy. In our reports of decisions in the *English* courts of justice, we find

find instances of all these various excuses being allowed as sufficient to justify a deviation ; and also another species of excuse, namely, to meet a convoy, which, indeed, is nearly connected with that of avoiding an enemy. I shall rank all the cases, which apply to this branch of our enquiry, under these several divisions.

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The first ground of necessity which justifies a deviation, is that of going into port to repair. If a ship is decayed, and goes to the nearest place to refit, it is no deviation ; because it is for the general interest of all concerned, and consequently for that of the underwriters, that the ship should be put in a proper condition capable of performing the voyage.

The ship *Eyles*, being at *Bengal* in the year 1732, the owner employed a Mr. *Halhead* to insure this ship in the *London* Insurance Office for 500*l.* the adventure thereon to commence from her arrival at *Fort St. George*, and thence to continue till the said ship should arrive at *London* ; and that it should be lawful for the said ship, in the said voyage, to stay at any ports or places without prejudice. The *Eyles* came to *Fort St. George* in *February* 1733, in her way to *England* ; but being leaky, and in very bad condition, upon the unanimous advice of the governor, council, commanders of ships, &c. she sailed for *Bengal* to be refitted ; and after being sheathed, in her return upon her homeward-bound voyage, she struck upon the *Engilee Sands*, and was lost. Evidence was read on the part of the plaintiffs, to prove that *Bengal* was the proper place to refit, and that the ship went thither for that reason ; that this was a voyage of necessity, and not a trading voyage, for she took nothing on board but water, provisions, and ballast. When this cause came on to be heard before Lord Chancellor *Hardwicke*, he refused to decide it, but directed an issue at law. His Lordship, however, observed, that the general principles laid down by the plaintiff's counsel were right, as stress of weather, and the danger of proceeding on a voyage, when a ship is in a decayed condition : and in such a case, if she went to the nearest place, he should consider it equally the same, as if she had been repaired at the very place from whence the voyage was to commence, according to the terms of the policy, and no deviation. It is a very material circumstance, that the governor ordered the lading to be taken out, to shew the necessity

Motteux and
others v. the
London As-
sur. Comp.
1 Atk. 545.

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cessity of the ship's being repaired; but there is not a syllable of proof why she might not have been equally repaired at *Fort St. George*. His Lordship, therefore, directed an issue to try, whether the loss in *July 1733*, was a loss during the voyage, and according to the adventure which was agreed upon, or intended to be insured. On a trial at *Guildhall*, in the Court of Common Pleas, the jury found in favour of the plaintiffs.

Guibert v.
Readshaw,
Sitt. in
Lond. Hil.
Vac. 1781.

This was an action on a policy of insurance on the *Nancy*, at and from *La Rochelle* to the coast of *Africa*, during her stay and trade there, and at and from thence to her port of discharge in the island of *St. Domingo*. Three days after the ship sailed from *La Rochelle*, she met with a gale, which strained her seams, and split her mizen-yard and rigging. The crew came in a body to the captain, desiring for the preservation of their lives to make to some port to repair. The vessel being a new one, and the captain finding that she had too little ballast, complied, and put into *Lisbon*, the nearest port; from whence, after taking in 500 rolls of tobacco as ballast, he proceeded to the coast of *Guinea*, traded there, and the ship was afterwards captured in the sight of *St. Domingo* before she arrived. The defendant insisted, that going into *Lisbon* was a deviation, and called witnesses, who were of opinion, that in the latitude in which the storm happened, there could be no difficulty in repairing all the damage the vessel was described to have received, even in the worst weather, as she might have proceeded to the coast of *Africa*, and repaired there at a less expence; and that a ship, loaded like that in question, could not need additional ballast. On the cross-examination, it came out that the premium would not have varied had the voyage been by the way of *Lisbon*.

Lord *Mansfield* left it to the jury, on the ground of necessity, to go to *Lisbon* for repairs. He said, that much depended upon the circumstance, that no additional premium would have been required for liberty to touch there. If the jury believed the evidence of the witnesses, they must find for the plaintiff, for that the whole of the defendant's case rested merely upon surmise and suspicions alone. The plaintiff accordingly had a verdict.

The next excuse for leaving the direct course is stress of weather. Upon this point the rule is this, that wherever a ship

in order to escape a storm, goes out of the direct course ; or when in the due course of the voyage, is driven out of it by stress of weather, this is no deviation ; because it was occasioned by the act of God, which, by a maxim of law, is said to work an injury to no man. It has also been held, that if a storm drive a ship out of the course of her voyage, and she do the best she can to get to her port of destination, she is not obliged to return back to the point from whence she was driven. This rule is exemplified by the following case.

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In an action on a policy of insurance of the ship *Atlantic*, warranted to sail with convoy from *England* to *St. Kitt's* on or before the first of *August* ; the question was, Whether there had been a deviation ? The ship was separated from her convoy by a storm. The captain being examined, said, his object, after his separation, invariably was to gain *St. Kitt's*, or to fall in with the convoy. That the ship was taken by an *American* privateer in lat. 34. lon. 59. Several captains were examined, who swore, that they would have taken the same course to get to *St. Kitt's*, or regain the fleet.

Harrington
v. Halkeld,
Sitt. in
Lord. Mich.
Vac. 1778.

Lord *Mansfield*.—"The single question is, Whether the captain was taken as he was going to *St. Kitt's* ? If he was not, he is perjured. The account he gives is, that on the 28th of *July* there was a storm, which separated the fleet ; that he did all he could to get to *St. Kitt's*, and to direct his course so as to meet the convoy crossing. The captain goes on the ground not to reason, but to obey, be the consequence what it might. He knows nothing of the insurance : he says to himself, If I obey, I am doing right. As to the protest, I do not see that it contradicts the captain's evidence. Other captains have looked at the log-book or journal ; and they say, they would have held the same course."

Verdict for the plaintiff.

Upon the subject of a departure from the course of the voyage, on account of stress of weather, another very important point has been determined, though the same principle runs through all the cases, that whatever happens by the act of God, shall not be imputed to man. On this ground it has been held, that if a
ship

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ship be driven out of her port of loading by stress of weather into another, and then does the best she can to get to her port of destination, it shall not be deemed a deviation, though she do not return to the port from whence she was driven,

Delaney v.
Stoddart,
1 Term Rep.
p. 22.

The case here alluded to was an action upon the case against the defendant, for not having insured a ship and cargo, pursuant to the orders of the plaintiff, by means whereof he was damaged, the ship having been lost (a) It was tried before Mr. Justice Buller at Guildhall, at the sittings after Trinity Term 1785; and a verdict was found for the plaintiff.

Wilkinson
v. Coverdale,
Sitt. in B.R.
at Guildhall
after Mich.
Term,
34 Geo. III.
1 Esp. Rep.
75.

(a) It may be proper to explain the nature of this action. When a man undertakes, either by an implied or express promise, to do a thing for another, and he neglects to do it, or does it unskilfully, the law gives the person injured an action for the negligence. This is the case in question with respect to insurance; and the only difference between this action, and that on a policy against the underwriters, is in point of form; for the plaintiff in this action is entitled to recover the exact sum he ordered to be insured: and the defendant is entitled to every benefit, of which the underwriter could have taken advantage, such as fraud, deviation, non-compliance with warranty, &c.

Smith v.
Lafcelles,
2 Term Rep.
187.

In a late case, the whole law upon this action was very fully and accurately stated by Mr. Justice Buller, and assented to by the whole Court; and upon this occasion that learned judge mentioned the three instances in which such an order to insure must be obeyed, otherwise this action will lie. First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases. The second class of cases is, where the merchant abroad has no effects in the hands of his correspondent, yet if the course of dealing between them is such, that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance, will still be obeyed, unless the latter give him notice to discontinue that course of dealing. Thirdly, If the merchant abroad send bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition, on which the bills of lading shall be accepted, which the other must obey, if he accept them, for it is one entire transaction. For if the commission from abroad consist of two parts, the one to accept the bill of lading, the other to cause an insurance to be made, the correspondent cannot accept it in part, and reject it as to the rest.

Wallace
v. Tellfair,
Sitt. after
Trin. 1786,
before Mr.
Jus. Buller,
2 Term Rep.
188. n. (a)
Smith v.
Cologan.
2 Term Rep.
188. n. (a)
Nisi Prius
before Mr.
Jus. Buller,
Mich. 1787.

So also if a merchant here accept an order for insurance, and limit the broker to too small a premium, in consequence of which no insurance can be procured, he is liable to make good the loss to his correspondent.

But if a person, to whom such orders are sent, does what is usual to get the insurance made, that is sufficient; because he is no insurer, and is not obliged to get insurance at all events. Thus if he send to Lloyd's, and the underwriters refuse to take the risk at any premium; and he afterwards send to get insurance done at Newcastle, he has done his duty, and can never afterwards be charged in this action, more especially if the plaintiff adopt and approve his acts.

Upon

Upon a motion for a new trial, the facts appeared to be these: C H A P.
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 The plaintiff, who lived at *St. Kitt's*, wrote a letter to the defendant, dated the 30th of *April* 1781, informing him that he intended to purchase a ship, and offering the defendant a share. On the 4th of *May* 1781, he wrote a second letter to the defendant, acquainting him that he had purchased the ship, but had only a share in it himself, the residue being divided into three or four more shares, one of which he had reserved for the defendant, in case he should wish to be concerned; and directing an insurance upon the ship *at and from St. Kitt's to London*, warranted to sail with convoy. On the 28th of *June*, the defendant wrote to the plaintiff, that he had no objection to a fourth, or a share equal to the plaintiff's. On the third of *July*, the plaintiff informed the defendant, that the ship had left the port to take in her cargo; that she let go an anchor at *Sandy Point*, but as the wind blew fresh, *she drove out and could not come in again; that she was obliged to go to Eustatius*, and he therefore hoped that the defendant had not neglected to make the insurance, for fear of accidents. The defendant, on the 19th of *July*, wrote thus to the plaintiff: "The insurance you ordered shall be done." Plaintiff again, on the 25th of *July*, wrote, that the *Friendship* did all in her power to get up from *St. Eustatius*, but could not, and therefore he sold her to Mr. *Ross* at *Eustatius*. I have already transcribed as much of the several letters as are material to the subject of this chapter; in addition to which the following facts appeared in evidence: That the ship *Friendship* had sailed from *St. Eustatius*, on the 1st of *August* with the convoy, and that she had afterwards foundered at sea; that *St. Eustatius* is in the direct road to *London* from *St. Kitt's*, and the convoy from *St. Kitt's* always looked into *St. Eustatius*, to take up any ships that might be there; that if the *Friendship* had sailed from *St. Kitt's*, she must have gone by *Eustatius*; but would not have stopped there: that when she was driven to *St. Eustatius*, after making several efforts to get back to *St. Kitt's* to finish her loading, and finding she could not succeed, she then took in the rest of her loading at *St. Eustatius*.

At the trial, several grounds of defence were made; but the only one, material for our consideration was, that the remaining at *St. Eustatius*, and not going back to *St. Kitt's*, was a deviation.

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tion. The learned judge, who tried the cause, was of opinion that it was not a deviation, being occasioned by stress of weather. Upon this ground, amongst others, the motion for a new trial was founded.

After argument at the bar,

Lord *Mansfield* said, "The only material question is, Whether there is a deviation in this case? and that depends on the evidence. If a storm drive a ship out of her voyage into any port, and being there, she does the best she can to get to her port of destination, she is not obliged to return back to the point from whence she was driven; but here the witnesses say, she tried to get back to *St. Kitt's* and could not: and it is a much easier navigation to go directly from *St. Eustatius* to *London*, than to go back to *St. Kitt's* first. And as to the taking in the cargo at *St. Eustatius*, I do not find that the ship lost any time by it. Every thing is the effect of the storm, and occasioned by it. This is the only point on which I had any doubt, and it required some consideration. It was a question, which was proper to be left to a jury, whether this was the same voyage or not, and they have determined it."

Mr. Justice *Willes* inclined to a different opinion.—"My only doubt is, whether it was the same voyage as that insured. So far as the ship was driven by stress of weather, so far is there an exception. When she is driven to *St. Eustatius*, she attempts to get back to *St. Kitt's*; but I do not find that she made any attempt to get to *London* at that time. When she was at *St. Eustatius*, the owner of the ship sold her to *Ross*, who loaded her afresh with tobacco instead of sugar, which was to have been her original cargo; so that there is a new cargo, a new owner, and a new voyage. In these cases we lean very much to deviation. In a case lately determined in this court, it was held, that going to *Beaumaris*, though only a few leagues out of the way, was a deviation. It strikes me as a case of some difficulty: perhaps the jury had not evidence enough laid before them, on which to determine; for there is nothing said on the part of the defendant as to the usual course of the voyage. The risk was certainly increased by the ship's continuing at *St. Eustatius* so long: for the insurance, if good at all, was good all the time she lay

lay by at *St. Eustatius*; and she might have continued there much longer. In my opinion, it is very well worth the re-consideration of a jury." C H A P.
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Mr. Justice *Asburs.*—"This ought to be considered as the same voyage insured. Wherever a ship is driven by stress of weather out of her own port into another, that shall not be considered as a déviation. Here the ship was forced by stress of weather to go to *St. Eustatius*; and being there, she endeavoured several times to get back to *St. Kitt's*, but without effect. In fact it was better for the parties that the cargo should be completed at *St. Eustatius*; her continuing there, rather diminishes the risk than otherwise; because if she had gone back to *St. Kitt's*, it would have taken up a longer time. If then every thing was done, that could be done, under such circumstances, for the benefit of the adventure, this shall not vacate the policy.

Mr. Justice *Buller.*—"It has been much relied on in this case, that there was a change of property; but that, in my opinion, makes no difference. Then laying that out of the question and supposing the ship as not being sold to *Ross*, I will first consider whether this is a different voyage. But that cannot be, as it would be contrary to the evidence: neither is it true, that the vessel afterwards pursued the same voyage by accident; for that part of the cargo, which she took in at *St. Kitt's*, continued on board of her the whole time, and the original intention of the ship's coming to *London* was likewise continued: the parties never thought of a different voyage. But it is said, that she took in another cargo at *St. Eustatius*: what says the evidence? Where a captain has not taken in a full cargo, it is usual to take in the rest at *St. Eustatius*: such was proved to be the custom of the voyage: and it was proved, that on a voluntary act of the captain's going to *St. Eustatius*, the policy would have protected the ship's stay there; *à fortiori* it will, when the ship was driven there by stress of weather. As to the defendant's not being prepared at the trial to answer the usage, he ought to have come prepared with that, which was the gift of his defence. Then was the risk altered? had it been so, it was in the defendant's power to have proved it; but there was no proof that it was altered; part of the same cargo continues; nor does it appear that they meant to alter the cargo, for she endeavoured to get

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back to *St. Kitt's* to take in the rest; but was prevented by storms. I think the risk would in reality have been much greater if she had gone back; for she must have come by the way of *St. Eustatius* again in her passage home. The part of her cargo, which was taken in at the time the ship was driven from *St. Kitt's*, has already been paid for by the defendant; even this would not have been paid for by the defendant, if he had conceived that the voyage had been at an end." The learned judges therefore, except Mr. Justice *Willes*, after giving their opinions upon the other points in the cause, ordered the rule for a new trial to be discharged.

Wolfe v.
Claggen,
3 Esp. 257.

But wherever the excuse of necessity is set up, whether arising from the act of God, or from any other cause, it must satisfactorily appear that every proper precaution was previously used by the assured, and that there was no default on his part, otherwise the plea of necessity shall not be admitted. The case in which this doctrine was advanced, was tried before Lord Chancellor *Eldon*, when Chief Justice of the Court of Common Pleas. The insurance was 'from *Altona* to *Surinam*. The defence was deviation, the vessel having put into *Plymouth*, out of the course of the voyage, and remained there 14 days. The answer on the part of the plaintiff to this defence was: that the captain was taken ill with a severe fit of the gravel, and that the mate having pricked his finger, by accident, his hand and arm swelled to such a degree, as to render him incapable of doing his duty, and that they had put into *Plymouth* for the purpose of procuring medical assistance. These facts, as to the captain's and mate's illnesses, and their application to a surgeon, were proved: but it also appeared, on cross examination, that the surgeon of the ship was unprovided with proper instruments and medicines. He was not called.

Lord *Eldon* said, he was of opinion that if by the visitation of God so many of the crew, who would otherwise have been sufficient, became so afflicted with sickness, as to be incapable of navigating the ship, such an illness of the crew was a necessity which might justify a deviation: but when it was set up as a justification of a deviation, he thought it incumbent on the plaintiff to shew that he had so far provided against such events, by every proper precaution, such as having medicines for

for the voyage, as much as he was bound with respect to the tightness of the ship. It was in evidence that a surgeon was necessary in such voyages: if therefore sickness was to be set up as an excuse for deviation, the plaintiff should shew that the surgeon was provided with such medicines and instruments as would probably become necessary in the course of the voyage, to meet the common casualties of the mariners. He was also of opinion, that the necessity for going into port ought to be made out by the plaintiff beyond all possibility of doubt, and that it arose and existed without any default of the master or party insuring: and if they came in for medical aid, he should expect medical men to be called to prove that such necessity existed. That had not been done in the case then before him, and the plaintiff must be nonsuited.

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A deviation may also be justified, if done to avoid an enemy, or seek for convoy; because it is in truth no deviation to go out of the course of a voyage, in order to avoid danger, or to obtain a protection against it.

In an action upon a policy, which was to insure the *William Galley* in a voyage from *Bremen* to the port of *London*, warranted to depart with convoy; the case was this, the *Galley* set sail from *Bremen*, under the convoy of a *Dutch* man of war to the *Elb*, where they were joined by two other *Dutch* men of war, and several *Dutch* and *English* merchant ships, whence they sailed to the *Texel*, where they found a Squadron of *English* men of war and an admiral. After a stay of nine weeks, they set out from the *Texel*, and the *Galley* was separated in a storm, and taken by a *French* privateer, taken again by a *Dutch* privateer, and paid 80*l.* salvage.

Bond v.
Confer, 2
Salk. 415.

It was ruled by Lord Chief Justice *Holt*, that the voyage ought to be according to usage, and that their going to the *Elb*, though in fact out of the way, was no deviation; for till after the year 1703, there was no convoy for ships directly from *Bremen* to *London*. And the plaintiff had a verdict.

On an insurance from *London* to *Gibraltar*, warranted to depart with convoy; it appeared there was a convoy appointed for that trade at *Spithead*; and the ship *Ranger* having tried for convoy in the *Downs*, proceeded to *Spithead*, and was taken in

Gordon v.
Morley.
Campbell v.
Bordieu,
2 Stra.
1265.

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her way thither. The insurers insisted that this being the time of a *French* war, the ship should not have ventured through the Channel, but have waited in the *Downs* for an occasional convoy. And many merchants and office-keepers were examined to that purpose.

But Lord Chief Justice *Lee* held that the ship was to be considered as under the defendant's insurance to a place of general rendezvous, according to the interpretation of the words *warranted to depart with convoy*. And if the parties meant to vary the insurance from what is commonly understood, they should have particularized her departure with convoy from the *Downs*. The juries were composed of merchants; and in both cases they found for the plaintiffs upon the strength of this direction.

Comp. Rep.
601.

In the case of *Bond* against *Nutt*, in which the material question was, whether a warranty had or had not been complied with, and which consequently will be fully stated in the following chapter, the point of deviation for the purpose of procuring convoy also came under the consideration of the court. Upon that occasion Lord *Mansfield* and the whole court held, that if a ship go to the usual place of rendezvous, for the sake of joining convoy there ready, though such place be out of the direct course of the voyage, it is no deviation.

Ende by
and another v.
Fletcher,
Sittings in
Lond. Trin.
Vac. 1780.

And in a more modern case, the only question was, Whether there was a deviation or not? Lord *Mansfield* there directed the jury to find for the plaintiffs, if they believed that the captain fairly and *bonâ fide* acted according to the best of his judgment: that he had no other view or motive but to come the safest way home, and to meet with convoy; for that it was no deviation to go out of the way to avoid danger.

In our law books we sometimes meet with cases, which say, that a deviation may be justified by the usage and custom of the trade. But that is not quite correct; for if by the usage of any particular trade, it is customary to stop at certain places, lying out of the direct course from *A.* to *B.* it is not a deviation to stop there; because it is a part of the voyage. There is no deception upon the insurer; because he is bound to take notice of the usages of trade; they are notorious to all the world; and when
the

the usage has declared it lawful in a specifick voyage to go to any place, though out of the immediate track, it is as much a part of the contract of insurance between the parties, as if it had been particularly mentioned. But in order to justify the captain of a ship in quitting the straight and direct line from the port of loading to that of delivery, there must be a precise, clear, and established usage upon the subject, not depending merely upon one or two loose and vague instances.

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Where a ship was insured from *Liverpool* to *Jamaica*, and had put into the *Isle of Man*; it appeared that there were *some instances* of the *Liverpool* ships putting in there, but it was not the settled, common, established, and direct usage of the voyage and trade: it was therefore held a deviation, and the underwriters were discharged from any loss that happened subsequent to the deviation.

Salisbury v.
Townson.

Having thus mentioned all the cases to be found in the books of reports, which operate as an excuse for a departure from the due course of the voyage, and which prevent those effects, which always follow a deviation, namely, the discharge of the insurer from his contract; it will be proper to observe, that it is not meant to insinuate that other circumstances may not frequently happen, which will have precisely the same consequences. For wherever a ship does that which is for the general benefit of all parties concerned, the act is as much within the intention and spirit of the policy, and consequently as much protected by it, as if expressed in terms. And therefore in all cases, in order to determine whether a diversion from the direct course of the voyage is such a deviation as in law vacates the policy, it will be proper to attend to the motives, end, and consequences of the act, as the true criterion of judgment.

Cowper 601.

If any of the circumstances above stated do really and *bona fide* occur, so as to render a deviation absolutely necessary, the ship must pursue such *voyage of necessity* in the direct course, and in the shortest time possible, otherwise the underwriters will be discharged. Because a voyage superadded by necessity, ought to be subject to the same qualifications, and entitled only to the same sort of latitude as the original voyage, it having become by operation of law, a part, as it were, of that original voyage.

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Lavabre v.
Walter,
Doug. 284.

This was laid down as law by the Court of King's Bench in a case, in which the voyage insured was described in these words: "At and from *Port L'Orient* to *Pondicherry*, *Madras*, " and *China*, and at and from thence back to the ship's port, or " ports of discharge in *France*, with liberty to touch, in the out- " ward or homeward-bound voyage, at the isles of *France* and " *Bourbon*, and at all or any other ports or places, what or " wheresoever: and it shall be lawful for the said ship, in this " voyage to proceed and to sail to, and touch and stay at any ports " or places whatsoever, as well on this side, as on the other side, " the *Cape of Good Hope*, without being deemed a deviation." The ship did not sail till the 6th of *December* 1776, and did not reach *Pondicherry* till the 23d of *July* 1777. She continued there till the 23d of *August* following. when, instead of proceeding to *China*, she sailed for *Bengal*, where having passed the winter, and undergone very considerable repairs, she sailed from thence early in the year 1778 (being the second ship that left the *Ganges*), returned to *Pondicherry*; and, after taking in a homeward-bound cargo at that place, proceeded in her voyage back to *L'Orient*, but was taken in *October* in that year by the *Mentor* privateer. The usual time in which the direct voyage between *Pondicherry* and *Bengal* is performed, is six or seven days, but the *Carnatic* was about six weeks in going to *Bengal*, and two months on the way back from thence to *Pondicherry*. Both going and returning, she either touched at, or lay off, *Madras*, *Masulipatam*, *Vizagapatam*, and *Yanon*, and took in goods at all those places. The plaintiffs rested their case chiefly on this ground, that the voyage to *Bengal* was adopted by necessity for the safety of the ship, upon the *bonâ fide* opinion of the captain, and the rest of the officers, and of one *Berard* the supercargo, who had the principal management. To prove this necessity it was sworn by *Berard* and four mates, that the ship had been detained longer in *Europe* than at first was foreseen, and that she met with extremely bad weather on her outward passage; and at *Pondicherry* was so leaky, that it appeared to them, that she must be careened, which could only be done at *Bengal*, there being no other place so near, to which she could proceed with safety, where that operation could be performed; for that no harbour between *Pondicherry* and the *Ganges* on the one side, and *Pondicherry* and *Bombay* on the other, would admit of so large a vessel being hove down, her burthen being near 800 tons. Indeed it turned out

when they got to *Bengal*, that she could be repaired without careening, but this was only discovered, they said, after she was unloaded of much more of her contents than could have been done with safety in the open road of *Pondicherry*. All the witnesses for the plaintiffs swore that they took the resolution of going to *Bengal* much against their inclination; for that it would have been not only more for the advantage of the owners, but also more for their private interest as individuals, to go to *China*, they having prepared their own adventures for that market. Besides the circumstances of the leak, they assigned an additional reason for relinquishing the voyage to *China*, viz. that they had been so long detained at *Pondicherry*, from delays in unloading their outward-bound cargo, that they were not ready to leave that place, till it was too late to undertake the *China* voyage with any degree of prudence or safety; and they said *Bengal* was the best place they could go to, in order to winter. The defence set up was; 1st, That the ship had never failed on the voyage insured, her destination, when she left *Europe*, having been for *Bengal*, and not for *China*. 2d, That supposing her to have failed on the voyage described in the policy, yet her going from *Pondicherry* to *Bengal*, instead of proceeding to *China*, was a deviation, and was not justified by necessity. In support of the first ground of defence, certain secret instructions were relied upon which were found on board the ship, and were addressed by the owner at *L'Orient* to *Berard* the supercargo, and which, though obscurely penned, gave great room to contend, either that, at her departure, it had been resolved to substitute the *Bengal* for the *China* voyage, or, at least, that the alternative was left with *Berard*, to be decided one way or the other, according to certain events in *India*, which events turned out in the sort of way that, according to the instructions, was to determine the voyage for *Bengal*. On the second ground, it was said, that from the plaintiff's own witnesses, there was no necessity for going to *Bengal*; and that instead of going directly thither, a trading voyage had been made from *Pondicherry*, which afforded a strong presumption that trading, and not the leak, or lateness of the season, was the object of going to *Bengal*. On the part of the defence also, several letters were read (written by the owners to their correspondents who had got their policy underwritten) to raise a presumption that the necessity of going to *Bengal*, was merely a pretence devised after the capture; and

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Vide ante,
c. 2.

when the insured began to apprehend that the words of the policy would not cover a voyage to that place. This is the substance of the evidence given in this, and two other causes upon the same ship, though not on the same policy: in addition to which in the present case, the secret instructions given to *Berard* had been more attentively perused, and afforded stronger reasons than they at first seemed to do, that the voyage to *Bengal* was pre-determined before the departure from *L'Orient*. The plaintiff's witnesses were much pressed, on this occasion, to say whether the lateness of the season alone was such as, independent of the leak, would have determined them to abandon the *China* voyage; and on the other hand, whether the leak, independent of the other reason, would, in their opinion, have rendered it necessary so to do. To this they said, they could not give a certain answer; for that as neither of the cases had happened, they had not exercised their judgment upon them.

Lord Mansfield summed up very strongly against the plaintiffs, on the head of fraud. But, independent of that ground, he stated a new point against them, namely, that if necessity were admitted to have been the sole motive for substituting the voyage to *Bengal* in the place of that of *China*, *still it was incumbent on the insured to have pursued that voyage of necessity directly, in the shortest and most expeditious manner: and that the delay in going from Pondicherry to Bengal, and the repeated stops by touching at different places, and trading there, were deviations, and not within the protection which the supposed necessity afforded to the direct voyage.*

Notwithstanding this direction, the jury found a verdict for the plaintiffs. Upon a motion for a new trial, after argument at the bar, the opinion of the Court of King's Bench was delivered by

Lord Mansfield.—"If this application were made upon the ground of impeaching the testimony of the plaintiff's witnesses, whatever my private sentiments might be, after two concurrent verdicts, I should not be inclined to interpose. But, without impeaching the evidence, I think there ought to be a new trial, or rather, that the case has been ill decided. The question is, Whether, without imputation on any body, circumstances have
not

not happened to take the voyage out of the policy? A deviation from necessity must be justified, both as to substance and manner. *Nothing more must be done than what the necessity requires.* The true objection to a deviation is not the increase of the risk. If that were so, it would only be necessary to give an additional premium. It is, that the party contracting has voluntarily substituted another voyage for that which has been insured. If the voyage to *Bengal* was unavoidable, where was the necessity to trade? All the ports touched at were out of the direct course; and six weeks and two months were consumed, instead of six days. The justice of the case required a different decision." The rule for a new trial was accordingly made absolute. The cause was again set down for trial; but the plaintiffs, when they were ready to be called on, submitted to the opinion of the court, and abandoned their claim against the underwriters.

So also if a ship be insured upon a trading voyage, it is incumbent on the parties assured, to carry on that trade with usual and reasonable expedition, otherwise their conduct will amount to a deviation, and discharge the policy.

Thus in an action by the assured against an underwriter on a policy of insurance on the ship *Blossom*, at and from the coast of *Africa* to the *West Indies*, with liberty to exchange goods and slaves; a verdict was given for the plaintiff. But upon a rule being obtained to shew cause why there should not be a new trial, it appeared that there had been a great deal of contradictory evidence, and many points started at the trial; but the question now made was, Whether the plaintiff, by the use he made of the vessel on the coast of *Africa*, and the delay he there occasioned, was not the cause of the loss; that is, whether he did not make such use of her during her stay on the coast, contrary to the design of the policy, as amounted to a deviation?

Hartley v.
Buggin,
B. R. Mich.
22 Geo. III.

It appeared in evidence, that this ship stayed on the coast from *August* to *March*; that she was employed in receiving slaves on board, the produce of the cargoes of other ships, which were afterwards put on board other ships, and sent to the *West Indies*; that this is the employment of what they call a *factory ship*; but that a regular factory ship is thatched and covered, and receives the slaves till a sufficient number is collected to send away in the vessels;

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vessels; but it did not appear that any slaves, the produce of the *Blossum's* own cargo, were sent away in other vessels, but that her stay there was several months beyond the usual stay of ships in that trade. After argument at the bar,

Lord *Mansfield* said, "When different points are agitated at a trial, and a great deal of evidence applied to each, and the counsel go out of the cause, it is not to be wondered at, if juries should lose their attention to the material point. The great advantage of a motion for a new trial is, that after argument on the motion, the cause goes down again winnowed from the chaff of the first trial. The single point here is, Whether there has not been what is equivalent to a deviation, whether the risk has not been varied? it is not material whether or not the risk has been greater. If a ship insured for a trade, is turned into a floating warehouse, or a factory ship, the risk is different, it varies the stay, for while she is used as a warehouse, no cargo is bought for her. The law being clear, how is the fact? The captain says she was not used as a factory ship, his evidence is much impeached; but he says he was young in the trade; he never saw a factory ship but once, and was not in her; he might have a salvo, because this was not thatched; but was she used as a thatched ship is used? It is said that letters are not records; 'tis true they may be contradicted; but if they are from the parties, and are not contradicted, they are as strong as any records. The fact is clear, the risk is different in point of length, &c." Rule absolute for new trial.

Parkinson
v. Collier,
Sitting in
K.B. after
Mich. 1797.

So in an action on a policy from *London* to *Port Endick*, on the coast of *Africa*, at six guineas *per cent.* on the ship till moored at anchor 24 hours, and on goods till discharged and safely landed. The ship arrived on the coast on the 6th of *May*, and was captured by the *French* on the 4th of *June*. The barter in the trade is carried on, on board the vessel, and the goods afterwards sent on shore, in boats, and the gums brought back. In this case, the discharge of the cargo had not begun, the gums not having been brought down to the coast, for which purpose it is necessary to have a previous agreement with the king of the country; but no delay had been used. The counsel for the defendant contended, that by the custom of this trade, the risk on the goods, as well as on the ship, expired in 24 hours, and that the risk on the

the cargo, while on the coast, was protected by the homeward policy, at 15 guineas *per cent.*—Lord *Kenyon* refused the evidence, both of the homeward policy, and of this supposed usage (which he had on a former occasion admitted against his own opinion, and on which a new trial had been granted), to qualify the clear and unequivocal language of the policy, which covered the risk, *till the goods were landed*. That if, in landing, any unnecessary delay had been used, that might amount to something in the nature of a deviation, so as to discharge the insurer; but that did not appear to be the case in the present instance.

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But though an actual deviation from the voyage insured is thus fatal to the contract of insurance; yet a deviation merely intended, but never carried into effect, is considered as no deviation, and the insurer continues liable. This has been frequently so decided. Thus in the case of an insurance from *Carolina* to *Lisbon*, and at and from thence to *Bristol*; it appeared, that the captain had taken in salt, which he was to deliver at *Falmouth* before he went to *Bristol*; but the ship was taken in the direct road to both, and before she came to the point, where she would have turned off to *Falmouth*. It was held, that the insurer was liable; for it is but *an intention to deviate*, and that was held not sufficient to discharge the underwriter.

Foster v.
Wilmer,
2 Str. 1249.

Lord Chief
Justice Lee.

In the case of *Carter v. the Royal Exchange Assurance Company*, where the insurance was from *Honduras* to *London*, and a consignment to *Amsterdam*: a loss happened before she came to the dividing point between the two voyages, for which the insurers were held liable to pay.

2 Str. 1249.

The doctrine laid down in these cases has since been frequently recognized in subsequent decisions, and particularly by Lord *Mansfield* in the case of *Thellusson v. Fergusson*, which will be fully reported in the next chapter. The insurance was from *Guadaloupe* to *Havre*, and by the depositions it appeared that the ship sailed for *Havre*, and was always intended for *Havre*, but was directed to keep in the course of *Brest* for safety. One of the grounds of defence was, that the ship never sailed from *Guadaloupe* to *Havre*, but on a voyage from *Guadaloupe* to *Brest*. Lord *Mansfield*, in answer, said, "the voyage to *Brest* was, at most, but an *intended deviation*, not carried into effect."

Doug. 361.

If,

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If, however, it can be made appear by evidence, that it never was intended nor came within the contemplation of the parties to sail upon the voyage insured; if all the ship's papers and documents be made out for a different place from that described in the policy, the insurer is discharged from all degree of responsibility, even though the loss should happen before the dividing point of the two voyages. This distinction was very properly taken by the court of King's Bench, in a modern case: and by that distinction they admitted the general doctrine, with respect to the intention to deviate, in its fullest extent.

Woodbridge
v. Boydell,
Doug. 16.

The ship *Molly* being insured "at and from *Maryland* to *Cadiz*," was taken in *Chesapeake Bay*, in the way to *Europe*. Upon this the insured brought this action against the defendant, one of the underwriters on the policy. The trial came on at *Guildhall* before Lord *Mansfield*, when a verdict was found for the defendant. A new trial being moved for, the material facts of the case appear to be as follows:—The ship was cleared from *Maryland* to *Falmouth*, and a bond given that all the enumerated goods should be landed in *Britain*, and all the other goods in the *British* dominions. An affidavit of the owner stated that the vessel was bound for *Falmouth*. The bills of lading were, "To *Falmouth* and a market:" and there was no evidence whatever that she was destined for *Cadiz*. The place where she was taken was in the course from *Maryland* both to *Cadiz* and *Falmouth*, before the dividing point. Many circumstances led to a suspicion that she was, in truth, neither designed for *Falmouth* nor *Cadiz*, but for the port of *Boston*, to supply the *American* army; but there was not sufficient direct evidence of that fact.—At the trial, Lord *Mansfield* told the jury, that if they thought the voyage intended was to *Cadiz*, they must find for the plaintiff. If on the contrary, they should think there was no design of going to *Cadiz*, they must find for the defendant. It also appeared in evidence, that the premium to insure a voyage from *Maryland* to *Falmouth*, and from thence to *Cadiz*, would have greatly exceeded what was paid in this case. Upon the motion for a new trial being argued, the counsel for the plaintiff cited the two cases above stated from *Strange's Reports*.

Lord *Mansfield*.—"The policy, on the face of it, is from *Maryland* to *Cadiz*, and therefore purports to be a direct voyage

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to *Cadiz*. All contracts of insurance must be founded on truth, and the policies framed accordingly. When the insured intends a deviation from the direct voyage, it is always provided for, and the indemnification adapted to it. There never was a man so foolish as to intend a deviation from the voyage described, when the insurance is made, because that would be paying without an indemnification. Deviations from the voyage insured arise from after-thoughts, after-interest, after-temptation; and the party, who actually deviates from the voyage described, means to give up his policy. But a deviation merely intended, but never carried into effect, is as no deviation. In all the cases of that sort, the *terminus a quo* and *ad quem*, were certain and the same. Here, Was the voyage ever intended for *Cadiz*? There is not sufficient evidence of the design to go to *Boston*, for the court to go upon. But some of the papers say to *Falmouth* and a market: some to *Falmouth* only. None mention *Cadiz*, nor was there any person in the ship, who ever heard of any intention to go to that port. A *market* is not synonymous to *Cadiz*: that expression might have meant *Naples*, *Leghorn*, or *England*. No man, upon the instructions, would have thought of getting the policy filled up to *Cadiz*. In short, that was never the voyage intended, and consequently is not what the underwriters meant to insure."

Mr. Justice *Buller*.—"I am of the same opinion. I believe the law to be according to the authorities mentioned on the part of the plaintiff: but it does not apply here. This is a question of fact. There cannot be a deviation from that, which never existed. The weight of the evidence is, that the voyage was never designed for *Cadiz*."

Mr. Justice *Willes* and Mr. Justice *Asbhurst* concurring in the opinion delivered by Lord *Mansfield* and Mr. Justice *Buller*, the rule for a new trial was discharged.

In a still later case the same doctrine was advanced; namely, that if a ship be insured from a day certain from *A.* to *B.*, and before the day sail on a different voyage from that insured, the assured cannot recover; even though the ship afterwards fall into the course of the voyage insured, and be lost after the day on which the policy was to have attached.

Way v. Me-
digiani,
2 Term Rep.
30.

Since

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Kewley v.
Ryan, 2 H.
Black. Rep.
p. 143. See
ante, p. 28.

Since the second edition of this work was published, the cases *Wooldridge v. Boydell*, and *Way v. Modigliani*, have again come under discussion in the court of Common Pleas; and it has been held by the four judges of that court, one of whom sat in the court of King's Bench when the two cases just reported were decided, that where the *termini* of the intended voyage continue the same as those described in the policy, an intention to go to an intermediate port, though that intention should be formed previous to the ship's sailing, will not vitiate the insurance till actual deviation. The case has already been quoted for another purpose; and the facts as to this point are shortly these. The insurance was *at and from Grenada to Liverpool*; the ship sailed from Grenada, bound for Liverpool, but with a design formed before the commencement of the voyage, as appeared by the clearances, and was admitted on all sides, to touch at Cork, in her way to Liverpool, but was totally lost before she arrived at the dividing point. In the course of the argument a case of *Stott v. Vaughan*, was mentioned, as having been tried before Lord Kenyon, at the sittings at Guildhall, after Hilary Term 1794, in which his Lordship nonsuited the plaintiff, in an action on a policy on this very ship, being of opinion that the case fell within those of *Wooldridge v. Boydell*, and *Way v. Modigliani*, and that there was no inception of the voyage insured. The court of Common Pleas, however, having taken time to deliberate upon this case of *Kewley v. Ryan*, delivered their opinion as to the 3d question, that where the *termini* of the intended voyage were really the same as those described in the policy, it was to be considered as the same voyage, and a design to deviate, not effected, would not vitiate the policy. That in *Wooldridge v. Boydell*, it appeared there was no intention that the ship should go to Cadix at all, which was mentioned in the policy as her port of delivery; and in *Way v. Modigliani* there was an actual deviation, by the ship going to fish on the banks of Newfoundland: those cases therefore were wholly different from the present, for here the ship was really bound to Liverpool, though there were also clearances for Cork (a).

(a) See the case of *Middlewood v. Blake*, 7 Term Rep. 162. where the several cases immediately preceding on the distinction between deviations intended, but not carried into effect, and non-inception of the voyage insured, are much considered.

From the proposition just established, namely, that a mere intention to deviate will not vacate the policy, it follows as an immediate consequence, that whatever damage is sustained before actual deviation, will fall upon the underwriters.

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Thus it was held by Lord Chief Justice *Holt*, who said, that if a policy of insurance be made to begin from the departure of the ship from *England* until, &c. and after the departure a damage happens, &c. and then the ship *deviates*, though the policy is discharged from the time of the deviation, yet for the damages sustained before the deviation, the insurers shall make satisfaction to the insured.

Green v. Young,
2 *Ld. Raym.*
840. 2 *Salk.*
444. S.C.

Subject to the rules already advanced, deviation or not is a question of fact, to be decided according to the circumstances of the case.

Dougl. 787.

In cases of deviation, the premium is not to be returned; because the risk being commenced, the underwriter is entitled to retain it.

Vide post.
c. 19.

In the case of *Hogg v. Horner*, above quoted, Lord *Kenyon* being of opinion that the ship had deviated, it was insisted for the plaintiff, that as the intention to go to *Faro* (the going to which place was the deviation relied on by the defendant) had existed prior to the sailing, it was a non-inception of the voyage insured, and he had a right to the return of premium. Lord *Kenyon*, however, was of opinion that there was an inception of the risk *at*, and the contract was entire, consequently there could be no return of premium. But of this, more will be said in a subsequent chapter.

Vide ante,
p. 394.

CHAPTER THE EIGHTEENTH.

Of Non-Compliance with Warranties.

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2 Term Rep.
p. 345.

Chap. 16,
27.

Paley's
Mon Phil.

IN the two preceding chapters we have seen the effect, which the non-observance of implied conditions has upon the contract of insurance; we shall now proceed to consider the nature of warranties; their various kinds; and how far they must be complied with on the part of the insured, in order to render the contract binding between the parties. A warranty in a policy of insurance is a condition or a contingency, that a certain thing shall be done or happen, and unless that is performed, there is no valid contract. It is perfectly immaterial for what view the warranty is introduced; or whether the party had any view at all: but being once inserted, it becomes a binding condition on the insured: and unless he can shew that he has literally fulfilled it, or that it was performed, the contract is the same, as if it had never existed. We have already seen that the breach of an implied condition is sufficient to avoid the policy; *à fortiori*, therefore, the effect must be the same, where the condition is express, and not liable to misrepresentation or error, because it makes a part of the written contract. To say that the underwriter should answer for a loss, notwithstanding the other party has failed in his engagements, would be to make a different rule in this species of contract, from that which subsists in every other; although this of all other contracts depends most upon the strictest attention to the purest rules of equity and good faith. Indeed the obligation to a strict performance of all promises and conditions in every species of contract, may be deduced, as has been truly observed by an elegant moral writer, from the necessity of such a conduct to the well-being, or the existence of human society.

We have said that a warranty must be strictly and *literally* performed; and therefore whether the thing, warranted to be done, be or be not essential to the security of the ship; or whether the
loss

loss do or do not happen, on account of the breach of the warranty, still the insured has no remedy; because he himself has not performed his part of the contract, and if he did not mean to perform, he ought not to have bound himself by such a condition. And though the condition broken be not, perhaps, a material one, yet the justice of the law is evident from this consideration: that it is absolutely necessary to have one rule of decision; and that it is much better to say, that warranties shall in all cases be strictly complied with, than to leave it in the breast of a judge or jury to say, that, in one case it shall, and another it shall not. The very meaning of a warranty is to preclude all enquiries into the materiality, or the *substantial* performance of it: and although sometimes partial inconveniences may arise from such a rule; yet upon the whole, it will certainly produce public salutary effects. The insured is bound not to draw the underwriter into error, by false declarations respecting those things, about which the contract is made. *Debet præstare rem ita esse ut affirmavit.*

C H A P.
XVIII.Term
Rep. p. 346.Pothier Tra-
du Contrat
d'Assu-
rance,
p. 197.

But as a warranty must be strictly complied with in favour of the underwriter, and against the insured, equal justice demands, and the true meaning of the contract of insurance requires, that if a strict and literal compliance with the warranty will support the demand of the insured, the decision ought to be in his favour, especially when by such a decision all the words in the policy will have their full operation.

In an action on a policy on goods, dated 9th December 1784, *lost or not lost, warranted well this 9th day of December 1784*; it appeared, that the warranty was at the foot of the policy; that the policy was underwritten between the hours of one and three in the afternoon of the 9th December; that the ship was well at six o'clock in the morning, but was lost at eight o'clock the same morning.

Blackburn
v. Cockell,
Term
Rep. 360.

Upon a motion to set aside a nonsuit, which had been entered, Lord Kenyon Chief Justice, Ashurst, Buller, and Grose, Justices, were clearly of opinion, that the warranty was sufficiently complied with, if the ship were well at any time that day; that the nature of a warranty goes to determine the question; for as it is a matter of indifference whether the thing warranted be, or be not material, and yet must be literally complied with; still if

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it be complied with, that is enough : that there was good reason for inserting these words, because they protected the underwriter from losses before that day, to which he would otherwise have been liable, as the policy was on the goods from the lading; and thus too, the words *lost or not lost* have also their operation.

Cowp. 607.

This being the case, it follows as a necessary consequence, that it is very immaterial to what cause the non-compliance is to be attributed ; for if the fact be, that the warranty was not complied with, though perhaps for the best reasons, the policy has no effect. The contingency has not happened ; and therefore the party interested has a right to say, that there is no contract between them. Upon this account it is, that if a ship be warranted to sail on or before the 1st of *August*, and she be prevented by any accident from sailing till the 2d of *August*, as by the sudden want of any necessary repair, or by the appearance of an enemy at the mouth of the port, the captain would do right not to sail : but there would be an end of the policy.

In this strict and literal compliance with the terms of a warranty consists the difference between a warranty and a representation.

Vide ante,
c. 10.

Of this distinction something was said in a preceding chapter : it is sufficient now to observe, that a warranty, as part of the agreement, and a condition on which it was made, must be *strictly* complied with, whereas a representation need only be performed *in substance*. In a warranty, the person making it takes the risk of its truth or falsehood upon himself : in a representation, if the insured assert that to be true, which he either knows to be false, or about which he knows nothing, the policy is void on account of fraud. But a representation, made without fraud, if not false in a *material* point, or if it be *substantially*, though not *literally* fulfilled, does not vitiate the policy.

Pawson v.
Watson,
Cowp. 787.

But as representations were very often made in writing, by way of instructions for effecting a policy, it became necessary to specify, what written declarations should be deemed warranties, and what representations. It was, therefore, by several decisions of the courts, held to be law, that *in order to make written instructions valid and binding as a warranty, they must appear on the face of the instrument itself, by which the contract of insurance is effected.*

So said by
all the
Judges, in
the case of
Lothian v.
Henderson,
House of
Lords, 3
Bos & Pull.
489.

This

This was declared by Lord *Mansfield* in a very particular manner in answer to a question put to him by Mr. *Davenport* at the desire of the underwriters, after he had delivered the opinion of the court upon a question on a representation.

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*Pawson v.
Watson,
Cowp. 790.*

Even though a written paper be *wrapt up in the policy*, when it is brought to the underwriters to subscribe, and shewn to them at that time ; or even though it be *wafered to the policy*, at the time of subscribing ; still it is not in either case a warranty, or to be considered as part of the policy itself, but only as a representation. Both these instances have occurred in causes before Lord *Mansfield*.

In an action on a policy of insurance, the counsel for the defendant offered to produce witnesses to prove, that a written memorandum inclosed was always considered as part of the policy. But Lord *Mansfield* said, it was a mere question of law, and would not hear the evidence ; but decided that a written paper did not become a strict warranty, by being folded up in the policy.

*Pawson v.
Barnesell,
at Guild-
hall, Trin.
Vacat.
1779.
Doug. p.
12. in the
notes.*

In the other case it appeared, that at the time when the insurers underwrote the policy, a slip of paper was wafered to it, describing the state of the ship as to repairs and strength, and also mentioning several particulars of her intended voyage, which particulars in the event had not been complied with. Lord *Mansfield* ruled, that this was only a representation ; and if the jury should think there was no fraud intended, and that the variance between the intended voyage, as described in the slip of paper, and the actual voyage as performed, did not tend to increase the risk of the underwriters, he directed them to find for the plaintiff, which they accordingly did. This verdict was afterwards set aside upon another ground (a).

*Pize v.
Fletcher, at
Guildhall
East. Vacat.
1779.
Doug. p.
12.
in the notes.*

It being thus settled, that a warranty must appear on the face of the instrument, it still became a question, whether a warranty, written in the margin of the policy, was to be considered equally binding, and subject to the same strict rule of construction, as if inserted in the body of the policy itself. This point came un-

(a) But if a policy of insurance refer to certain printed proposals, the proposals will be considered as part of the policy. *Worsley v. Wood*, in error, 6 Term Rep. 710. See also *Rantledge v. Burrell*, 1 H. Black. 254.

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der the consideration of the court in the case of *Bean and Stupart*, in which the material question was, Whether, supposing it to be a warranty, *boys* were included under the word *seamen*? That case, as far as it is material to our present enquiry, was as follows:

Bean v.
Stupart
Doug. 11.

The plaintiff insured the ship called the *Martha*, at and from *London* to *New York*; the voyage to commence from a day specified; and in the margin of the policy were written these words, "Eight nine pounders with close quarters, six six pounders on her upper decks; thirty seamen besides passengers."

Upon a motion for a new trial in this case, Lord *Mansfield* said, there is no doubt but this is a warranty. Its being written on the margin makes no difference. Being a warranty, there is no doubt but that the underwriters would not be liable if it were not complied with, because it is a condition on which the contract is founded.

Kenvon v.
Perthou,
Mich. Vac.
1779.
Doug. p. 12.
note (v.)

In an action on a policy of insurance, it appeared that the following words were written transversely on the margin of the policy: "In port 20th *July*, 1776." In fact, the ship had sailed the 18th of *July*. The question was, Whether this marginal note was a warranty or a representation?

Lord *Mansfield*.—"The question is, Whether the ship's being in port on the 20th is part of the condition of the instrument? When it is on the face of the instrument, it is a part of the policy; so that here, if the ship was not in port, it is no contract. As to its being only in the margin, that makes no difference: it is all part of the contract when it is once signed. And though the difference of two days may not make any material difference in the risk, yet as the condition has not been complied with, the underwriter is not liable."

The propriety of these decisions has never been questioned, and the rule has been constantly and tacitly acquiesced in from the time in which these cases were determined till the year 1786, when, notwithstanding the uniformity of the determinations upon the subject, it once more became an object of discussion.

It came before the court upon a special verdict : it was an action of assumpsit brought by the plaintiff (an underwriter) against the defendant, to recover back the amount of a loss which he had paid upon a policy of insurance. The defendant pleaded the general issue. The cause came on to be tried before Mr. Justice *Buller*, at *Guildhall*, when the jury found a special verdict, stating :

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De Hahn
v. Hartley
1 Term
Rep. p. 341.

That the defendant on the 14th of *June* 1779, gave to his insurance broker instructions in writing, to cause an insurance to be made on a certain vessel, called the *Juno*. (Then the instructions are set out in the verdict, signed by the defendant.) The verdict then states that the broker, in consequence of such instructions, on the said 14th of *June* 1779, did cause a policy of insurance to be made on the *Juno*, upon goods and merchandizes laden on board, and also on the ship, at and from *Africa*, to her port or ports of discharge in the *British West Indies*, at and after the rate of 15*l. per cent.* The verdict, after reciting two memorandums, not material, then proceeded to state, that in the margin of the said policy were written the words and figures following : " Sailed from *Liverpool* with 14 six-pounders, swivels, " small-arms, and 50 hands or upwards ; copper sheathed ; " That the plaintiff underwrote the policy for 200*l.* at a premium of 3*l.* 10*s.* That the *Juno* sailed from *Liverpool* on the 13th of *October* 1778, having then only 46 hands on board her, and arrived at *Beaumaris*, in the Isle of *Anglesea*, in six hours after her sailing from *Liverpool*, with the pilot from *Liverpool* on board her, who did pilot her to *Beaumaris*, on her said voyage ; and that at *Beaumaris* the *Juno* took in six hands more, and then had, and during the said voyage, until the capture thereof, continued to have 52 hands on board her. That the said ship in the voyage from *Liverpool* to *Beaumaris*, until and when she took in the said six additional hands, was equally safe, as if she had had 50 hands on board her for that part of the voyage. The verdict then states, that the defendant was interested, and that the ship was captured : that on receiving an account of the loss of the vessel, the plaintiff paid to the defendant the sum of 200*l.* not having then had any notice that the said ship had only 46 hands on board her when she sailed from *Liverpool*.

For the defendant it was said, that this representation had no relation to the voyage insured ; for that was at and from *Africa*.

&c.

C H A P. &c. whereas this is merely an account of the state of the ship
 XVIII. at *Liverpool*.

Lord *Mansfield*.—"There is a material distinction between a warranty and a representation. A representation may be *equitably* and *substantially* answered; but a warranty must be *strictly* complied with. Supposing a warranty to fail on the 1st of *August*, and the ship did not fail till the 2d, the warranty would not be complied with. A warranty in a policy of assurance, is a condition or a contingency, and unless that is performed there is no contract. It is perfectly immaterial, for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it is literally complied with. Now in the present case, the condition was, the sailing of the ship with a certain number of men, which not being complied with, the policy is of no effect."

Mr. Justice *Asbhurst*.—"The very meaning of a warranty is to preclude all questions whether it has *been substantially* complied with: it must be *literally* so."

Mr. Justice *Buller*.—"It is impossible to divide the words written in the margin, in the manner which has been attempted at the bar; that that part which relates to the copper sheathing should be a warranty, and not the remaining part. But the whole forms one entire contract, and must be complied with throughout." Judgment for the plaintiff. A writ of error was brought in the Exchequer-chamber upon this judgment, which, after two arguments, was affirmed by the unanimous opinion of the eight judges, composing that court. *Michaelmas Term 1787, 28 Geo. 3.*

Having stated those rules, which apply to warranties in general, it will now be proper to consider the several kinds of warranties, and those principles which are peculiar to each species, confirmed by decisions of the courts. It would be endless to enumerate the various warranties that are to be found in policies: because they must frequently, and for the most part do depend upon the particular circumstances of each case; such as the number of men, of guns, being copper sheathed, &c.

But

But those which most frequently occur in our books of reports, and upon which the greatest questions have arisen, may be reduced to three classes: Warranty as to the time of sailing; warranty as to convoy; and warranty of neutrality. Of each of these we shall treat; observing in the first place, that those rules which are applicable to warranty in general, must necessarily also apply to each of these individually.

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1st, As to the time of sailing. In most voyages, the time at which they are to commence is a material circumstance; because in every country there are some seasons when navigation is much more dangerous than at others, owing to periodical winds, monsoons and various other causes. Indeed, we have seen, that a man having once warranted to sail on a particular day, whether the risk be, in fact, materially altered or not by a breach of that warranty, the underwriter is no longer answerable. But this strict adherence to the very day specified, must have arisen from the principles just stated: for if a latitude of one day were given, why not extend it farther? It has therefore been held, that when a ship has been warranted to sail on a particular day, though the ship be delayed for the best and wisest reasons, or even though she be detained by force; the warranty has not been complied with, and the insurer is discharged from his contract.

Roccus,
Not. 32.

Kenyon v.
Berthon,
supra.

Thus in an action on a policy of insurance, upon a motion to set aside the verdict which had been given for the plaintiff, the case appeared to be this. The declaration stated, that a policy was made on the ship *New Westminster*, at and from *Jamaica* to *London*, warranted to sail on or before the 26th of July 1776, free from capture, and free from all restraints and detractions of kings, princes, and people of what nation, condition, or quality soever. It further stated, that the said ship was prepared and ready to sail, and would have sailed on the 25th of July, on her intended voyage, if she had not been restrained by the order and command of Sir *Rafel Keith*, the then governor of *Jamaica*, and detained beyond the day: that she afterwards sailed and was captured. For the plaintiff it was said, that the usual clause against the detention of rulers and princes being inserted in this policy, the embargo, by which the ship was prevented from sailing on the day mentioned in the war-

Hore v.
Whitmore,
Cowp. 7846

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warranty, came expressly within the meaning of it, and therefore excused the delay.

On the other hand it was said, that the loss of the ship could in no possible respect be connected with the embargo. That the warranty was *positive and express*: that the ship should depart on or before the day appointed, and therefore must be complied with. Of this opinion was the Court; and accordingly the rule to set aside the verdict for the plaintiff, and to enter a non-suit, was made absolute.

ROCCO,
Nov. 33.

But the necessity of a punctual adherence to the day on which the ship is warranted to sail by the policy, is not peculiar to the law of *England*: for we find that foreign writers declare, that the same rule is universally adopted. If, say they, the owner of the ship or goods has said in the policy, that he will be ready to sail at a particular time, at which, perhaps, the navigation may be less dangerous; and on this account the insurer is more easily induced to underwrite the policy; and he afterwards delay the time of sailing, and the ship and goods perish, the underwriter is not bound, for he who neglects to depart at the appointed time, must, if he sail at a subsequent period, do it entirely at his own risk (a).

If the warranty be to sail *after* a specific day, and the ship sail before, the policy is equally avoided as in the former case; because the terms of the warranty are as much departed from in the one case as in the other.

VERNON v.
Grant, before Mr.
Just. Buller,
Guildhall,
East. Term.
1779.

On the 8th of *December* 1777, a policy was underwritten by the defendant on goods in a *French* ship, *Le Compte de Trebon*, "at and from *Martinico* to *Havre de Grace*, with liberty to touch at *Guadaloupe*; warranted to sail after the 12th of *January*, and on or before the first of *August* 1778." The insurance was made by the plaintiff on account of *Jacques Horteloup* and *Louis de Lamare* of *Havre de Grace*, owners of the ship and cargo; at which time it was not known whether she would

(a) ROCCO, in this passage, quotes the work of Bentham, upon insurances, who, he observes, *exclamat contra magis pro equum, et nautis, quando delinquitur in parte a maribus, et de delictis nautis*.

load at *Martinico* or *Gaudaloupe*, they having goods to come from both places; the policy was therefore intended to cover the risk from both, or either of them. The ship, having finished her outward voyage at *Martinico*, sailed from thence on the 6th of September 1777, for *Guadaloupe*, where she took in her whole loading, without returning to *Martinico*, which the captain intended to do, had he not got a complete cargo at *Guadaloupe*, from whence she sailed on the 26th of June 1778, and was taken on the 3d of September. The plaintiff demanded payment of the loss from the underwriters, which being refused, he brought actions against them for the recovery thereof. This cause came on to be tried at *Guildhall*, before Mr. Justice *Buller*, when the defendant's objections were, that according to the words of the policy, the voyage was to commence from *Martinico*, and not from *Guadaloupe*, and that the warranty of the time of sailing was not complied with, *the ship having sailed from Martinico before the 12th of January 1778*, to wit, on the 6th of November 1777. The jury, under the direction of the learned judge, were of that opinion, and accordingly found a verdict for the defendant.

But when a ship is warranted to sail on or before a particular day, if she sailed from her port of loading, *with all her cargo and clearances on board*, to the usual place of rendezvous at another part of the same island, merely for the sake of joining convoy, it is a compliance with the warranty, though she be afterwards detained there by an embargo beyond the day. The ground is, that when a ship leaves her port of loading, when she has a full and complete cargo on board, and has no other object in view but the safest mode of sailing to her port of delivery, her voyage must be said to commence from her departure from that port. If, indeed, her cargo was not complete, it would not have been a commencement of the voyage. It is true, in the case about to be reported, Lord *Mansfield* was of a different opinion at the trial; and it certainly was a case of considerable difficulty: but when it came again before the Court, it underwent a great deal of discussion, and after long and mature deliberation of all the judges, his lordship candidly acknowledged that his former decision was wrong; and upon a subsequent occasion, he declared he was completely convinced, that the voyage commenced

Cowp. 603.

C H A P. commenced from the port of loading. As that is the leading
XVIII. case upon this subject, it is here reported at length.

Bond v.
Nutt,
Comp. 601.

This was an action on a policy of insurance upon the ship *Capel* in the *West India* trade, lost or not lost, at and from *Jamaica* to *London*; warranted to have sailed on or before the first of *August* 1776. The policy was effected on the 20th of *August* 1776, at a premium of 75 guineas per cent. to return 5 per cent. if the ship departed with convoy; and 3 per cent. if with convoy for the voyage, and arrived safe. At the trial, there was no controversy about the facts; and they are shortly these: the ship was completely laden for her voyage to *England*, at *St. Anne's* in *Jamaica*; and sailed from *St. Anne's Bay*, on the 26th of *July* for *Bluefields*, in order to join the convoy there, *Bluefields* being the general place of rendezvous for convoy on the *Jamaica* station, like *Spithead* in *England*, and where a convoy then lay, which was expected to sail for *England* every day: but the greater part of the way from *St. Anne's* to *Bluefields*, is out of the direct course of the voyage from *St. Anne's* to *England*. That she arrived off *Bluefields* on the 28th or 29th of *July*, where she was immediately stopped by an embargo laid on all vessels being in any part of *Jamaica*, and was detained there till the 6th of *August*, when she sailed with the convoy for *England*; but afterwards, being separated in the passage, was taken by an *American* privateer. Upon these facts the jury found a verdict for the defendant. When this case was first argued at the bar, two points were relied upon for the defendant, in support of the verdict, which the jury had given in his favour: 1st, That the departure from *St. Anne's* was not a departure from *Jamaica*, within the meaning of the policy. 2d, If it were, that the going to *Bluefields* was a deviation. Upon the first argument, Lord Mansfield said: One point now started is entirely new: that supposing the voyage to have begun from *St. Anne's*, that going to *Bluefields* (which, it is admitted on all hands, was out of the course of the voyage) though for the purpose of convoy only, shall be considered as a deviation. In answer, it has been said by the counsel for the plaintiff, that there are cases in which the contrary has been held: but they are not cited. I could wish therefore that these cases might be particularly looked into, and this ground mentioned again. It is a very material point: but widely different from a warranty to depart on a particular day, which is a condition precedent that admits of no latitude,

*Vide the
 preceding
 chapter.*

The

The second point was again argued; and then the judges severally mentioned their ideas upon the subject, without coming at that time to any decision. CHAP.
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Lord *Mansfield*.—"I am extremely glad this motion has been made; the cause came on at *Guildhall*, by the candour of the parties in the fairest manner. But I had no intimation of its being a cause of consequence till after the verdict; when I was informed 100,000*l.* depended upon it. The question was fairly tried, and the case has been very well argued on both sides. I have thought much of it since the trial. Some things are clear, and there are others which require consideration. The policy was made on the 20th of *August* 1776, upon the contingency of a fact, which must have existed one way or the other at the time the policy was underwritten. That contingency was, that the ship should have sailed on or before the 1st of *August*: consequently it must have taken place or not upon the 20th of that month. The port, from whence the ship was to be insured, was, if I may use the expression, the whole island of *Jamaica*: but from which of the ports the ship would sail, neither party knew: therefore they have used the words, "at and from *Jamaica*:" by force of which she certainly was protected in going from port to port, and till she sailed. It follows, that the word *sailed* in the warranty, must mean that she had sailed on her homeward-bound voyage. The question then is a matter of fact; and one that admits of no latitude, no equity of construction, or excuse. Had she or had she not sailed on or before that day? That is the question. No matter what cause prevented her; if the fact is, that she had not sailed, though she staid behind for the best reasons, the policy was void: the contingency had not happened; and the party interested had a right to say, there was no contract between them. Therefore what was said in argument is very true: if she had been prevented by any accident from sailing till the second of *August*, as by the sudden want of any necessary repair, or if an enemy had been at the mouth of the port; the captain would have done very right not to sail, but there would have been an end of the policy. It is very different from the cases where a voyage has been begun: there the usage of the voyage may justify going a little out of the direct course. This also is clear; if the ship had broken ground, and been fairly under sail upon her voyage for *England* on the 1st of *August*, though she

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Thellusson
v. Felguson,
at Guildhall,
Hil. V. c.
1777.

she had gone ever so little away, and had afterwards put back from the stress of weather, or apprehension from an enemy in sight, or had then been put under an embargo, and had been detained till *September*, it would still have been a *beginning* to sail; and the stoppage would have come too late: because the warranty was upon a fact antecedent. Such a case happened before me a day or two after the present action was tried. It was an insurance upon a ship from *Grenada* to *London*, warranted to sail on or before the 1st of *August*. She had barely begun to sail on the day, when she was stopped by an embargo, and detained beyond the time. I thought the voyage was begun; the jury were of that opinion: and there has been no motion for a new trial. I am giving no opinion, only breaking the case. Here the whole question turns upon this: Did the voyage from *Jamaica* homeward begin from *St. Anne's*, or from *Bluefields*? Perhaps where a voyage is once begun, the going a little out of the way to join convoy may be very reasonable, and for the benefit of all parties: but still it does not vary the fact of sailing. Here it was very reasonable: but the question, whether the voyage began from *St. Anne's* or *Bluefields*, still remains. Another material circumstance arises from the words, "at and from *Jamaica*." At the trial, I reasoned thus: "By the terms of the policy she was protected during her stay at *Jamaica*: by force of them, she had a right to go to any port, or all round the island; and she went to *Bluefields* for reasons best known to herself. Therefore the voyage began from *Bluefields*." Had the insurance been at and from the port of *St. Anne's*, it did strike me, that going round the island to *Bluefields*, would have been a deviation. But this a question of so much value and consequence, that the Court wishes to consider the case thoroughly, before they give a final decision upon it."

Mr. Justice *Asson*.—"I shall be very glad to consider this case. As at present advised, it seems to me to depend upon a mere matter of fact: and therefore to be very different from the cases of deviation that have been put. In them, the change of voyage, being from necessity, is excused in point of law: but here, the whole question is, Did the *Capel* sail from *Jamaica* on or before the 1st of *August*, according to the true sense and meaning of the policy? If she had fairly commenced her voyage, on her departure from *St. Anne's*, and the going to *Bluefields* is to be taken as the

the usage of the voyage, I should think the underwriters would be liable. So, if she had broken ground for the voyage, and had gone but a league, and been blown back again. But if she had found no convoy at *Bluefields*, she could not have staid there to wait for convoy: that would have vacated the policy. So, if her going to *Bluefields* is to be considered only as a continuation of her stay at *Jamaica*, the policy is at an end. She certainly was ready at *St. Anne's* to depart for the voyage: and she went to *Bluefields*, not to take in part of her cargo (for then it would clearly not have been a commencement of the voyage), but from a just motive. Whether that was or was not a commencement of the voyage, is clearly a matter of fact; and in this case a very material one; therefore ought to be very fully considered."

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Mr. Justice *Willes*.—"This is clearly a matter of fact. I think if the ship upon her arrival at *Bluefields* had found no convoy, she could not have staid there; but must have sailed immediately: or if she had met with convoy, and had staid an unreasonable time for other ships, the insurers would not have been liable."

After these opinions, which evidently lean in support of the verdict, had been delivered, the Court took further time to deliberate; and then their unanimous opinion was pronounced by

Lord *Mansfield*.—"We are all satisfied that the truth of the case is, that the voyage from *Jamaica* to *England* began from *St. Anne's*. That when the ship sailed from *St. Anne's*, she had no view or object whatsoever, but to make the best of her way to *England*. That the value of this question, admitted on both sides, shews, that every other ship, under the same circumstances, looked upon the touching at *Bluefields*, where the convoy then lay ready, to be the safest course of navigation from *Jamaica* to *England*; and that it would have been unwise and imprudent for any ship not to have touched there. The great distinction is this: that she sailed from *St. Anne's* for *England* by way of *Bluefields*; and that it was not a voyage from *St. Anne's* to *Bluefields* with any object or view distinct from the voyage to *England*. If she had gone first to *Bluefields* for any purpose independent of her voyage to *England*, to have taken in water, or letters, or to have waited in hopes of convoy coming there,

none

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none being ready, that would have given it the condition of one voyage from *St. Anne's* to *Bluefields*; and another from *Bluefields* to *England*. But here, under all the circumstances, we think she had no other object than to come directly to *England* by the safest course." Therefore the rule for a new trial was made absolute.

A few years afterwards a similar decision was made; and the only difference between the cases was this, that in the case now to be mentioned, it was a condition inserted in one of her clearances, that she should pass *by the place* (at which she was detained by the governor beyond the day named in the warranty) to take the orders of government. But this was not thought sufficient to induce the Court to depart from the decision in *Bond and Nutt*; especially as in this case, the place where the ship was detained was in the direct course of the voyage.

Thellusson
v. Ferguson,
Doug. 361.

It was an action on a policy of insurance on the *French* ship *L'Aimable Gertrude*, "at and from *Guadaloupe* to *Havre*, warranted to sail on or before the 31st of December." It was tried before Lord Mansfield; when a verdict was found for the plaintiff. A motion having been made for a new trial, the case from his Lordship's report appeared to be as follows: *The ship took in her complete lading and provisions for France, and all her clearances and papers at a port, called Pointe a Pitre, in the island of Guadaloupe, and sailed from thence on the 24th of October, for Basseterre, where there is no port, but only an open road. The town of Basseterre is the residence of the French governor. The ship arrived there at night, when the captain went on shore, and next day waited on the governor, who would not permit him to depart, and to prevent it, took his ship's papers from him. At this place he was detained with his ship till the 10th of January, when he set sail with a convoy, which had arrived some little time before, and being separated after some days from the convoy, the ship was taken by an English vessel. The captain, who was the only witness produced at the trial, swore, that notice had been given on the part of the governor, some days before he sailed, to him and the other captains of ships at Pointe a Pitre, who were preparing to sail for Europe, that a convoy was expected to be at Basseterre from Martinico, on the 25th of October, and that in consequence of this intimation, he had worked night and*

and day to get ready, and had paid extraordinary gratifications to obtain the ship's papers and clearances as soon as possible; that the desire of being in time for the convoy was the only reason for this haste; and that, although he was not able to sail till the 24th, he was still in hopes of being in time for the convoy, as he thought it might very probably have been detained at *Martinico* some days beyond its time. The last ship papers, which he received at *Pointe a Pitre*, was *Le Role d'Equipage*, or the muster roll. This paper, which was much relied upon by the counsel for the defendant, was dated the 24th of *October*, and was in the following words: "Vu par nous, chargé du detail des classes au departement de La Grande terre *Guadaloupe*, l'equipage, denommé au role des autres parts au nombre de vingt personnes, le capitaine compris. Permis au Sieur *Jean Jacques Lethuillier* commandant le navire *L'Aimable Gertrude* du *Havre*, de s'en servir pour faire son retour, au dit lieu, passant a la *Basseterre* pour y prendre les ordres du gouvernement en observant les ordonnances et reglemens de la marine."

Under this there was written, on the same paper, an account, dated the 30th of *October*, of some changes in the number of the crew, and under that, the following entry: "Vu par nous, ecrivain de la marine chargé du detail des classes, les vingt cinq personnes existantes au present rôle, le capitaine compris. Il est permis au Sieur *Lethuillier* commandant le navire *L'Aimable Gertrude*, du *Havre*, de faire son retour au dit lieu en se conformant aux ordonnances et reglemens royaux de la marine. A *Basseterre Guadaloupe*, le 2 *Janvier* 1779." On another paper, called *Le Congé*, dated the 16th of *October*, which was read on the part of the plaintiff, there was written, at the bottom, as follows: "Vu de relache a la *Basseterre Gaudaloupe*, pour y attendre un convoi pour *France*. Ce 28 *October* 1778. *Monentbeill*." The captain swore that he understood the only reasons for the condition in the muster roll, that he should go to *Basseterre*, were, the convoy was to be at that place, and that he might take such dispatches as were ready for *Europe*. He had not objected to it; because in the regular course of his voyage to *France* from *Pointe a Pitre*, he must have gone that way, close under the guns of *Basseterre*, in order to avoid *Montserrat*, there being no other road, except they were to keep quite to the leeward, which is not the custom. If he had arrived there in the day-time, he would not have cast anchor, but would have sent
his

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his boat for the dispatches; but having arrived at night, his ship had been detained, contrary to his intention and expectation. The defendant's counsel, to invalidate the captain's testimony, besides the muster roll, and the entry under it, as above stated, read the protest made by the captain on his arrival at *Dover*, and also his deposition in answer to the 29th interrogatory in the proceedings in the Admiralty on the condemnation of the ship. The words of the protest, on which they relied, were as follows: "whereupon he (the captain) waited on the proper officer at *Pointe a Pitre* for his muster roll, and was by him informed, "it could not be granted, but on condition that he should first sail to *Basseterre*, and there wait the directions of the general of the island." And in a subsequent part, "Whereupon at his (the captain's) instance, the said *John Nicholas Lethuillier*, his father came to *Basseterre*, and went with Messrs. *Gobert* and *Batuel*, commissioners of commerce, to the superintendent, and also to the general of the island, stating to them that the said ship and cargo were insured upon condition that she should have departed from the island of *Guadaloupe* before the 31st of *December*, the terms of which insurance they judged it essential to fulfil, notwithstanding which they were still refused permission to depart, and were kept there until after the 31st of *December*." The deposition relied on was as follows: "At the time the ship was first pursued and taken, she was steering her course towards *Brest*. Her course was not altered upon the appearance of the vessel, by which she was taken. Her course was at all times, when the weather would permit, directed to *Brest*, for which port she was directed to sail, although the destination was for *Havre de Grace*, by the ship's papers. She was not, before nor at the time of the capture, sailing beyond or wide of *Havre de Grace*. She was then about eight leagues west of *Ushant*, and her course was not altered to any other port or place, but was obliged to be directed to *Brest*, in consequence of the orders he had received, subsequent to the delivery of the ship's papers." In answer to the 27th interrogatory, his deposition was, "That all the ship's papers found on board were true and fair, and none of them false and colourable." At the trial the captain swore, that he had received directions to keep in the course to *Brest* at *Basseterre* from his father, who had formerly commanded the ship,

but

but this was done as the safest way, in time of war, of getting to Havre, which still continued to be the place of the ship's destination. Upon this evidence, the defendant's counsel made two objections, as grounds for a new trial: 1st, That there had been no inception of the voyage on the 24th of October, nor till after the 31st of December: 2dly, that the ship never sailed on the voyage insured, viz. from Guadalupe to Havre, but on a voyage from Guadalupe to Brest. After both these points had been fully argued at the bar,

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As to the 2d point vide ante, c. 17.

Lord Mansfield said:—"In my apprehension, there is no contradiction between the parole evidence, and the protest and depositions. This captain had never heard of the case of *Bond* and *Nutt*. Under an insurance at such a place as Guadalupe or Jamaica, the ship is protected in going from port to port in the island. But the question here is, whether the voyage was *bonâ fide* commenced; and stopped by accident. As to the condition about taking the orders of government, the ship could not sail from any part of the island without the governor's leave. But the captain when he left *Pointe à Pitre*, expected to meet a convoy at *Basseterre*, and to proceed immediately without interruption. A convoy had been published, and he certainly would have gone to *Basseterre* at any rate, independent of the clause in the muster roll. With regard to the second point, the voyage to *Brest*, was, at most, but an intended deviation, not carried into effect."

Vide c. 17.

Mr. Justice Willes and Mr. Justice Ashburst concurred.

Mr. Justice Buller.—"The case in 1777 between the same parties is in point. There was no embargo there, nor in the present case, when the ship sailed. There must be a lawful *bonâ fide* sailing, which I think there was in this case. The ship was completely ready in all respects." The rule for a new trial was, therefore, discharged.

See Lord Mansfield's opinion in the case of *Bond v. Nutt*, where he quotes the case alluded to.

Notwithstanding the uniformity of decision in all these cases, the judgment given in the last cause was not satisfactory to about twenty other underwriters upon the same policy, nineteen of whom obtained leave to consolidate their different causes upon the

See the Introduction for the Hist.

C H A R.
X / III.

Copy of the
Conf. lisa-
tion Rule.

Thelluson
v. Staples,
Sittings at
Guildhall,
Eaft. Vac.
1780.

the usual terms, in order to bring the question once more into court. Accordingly, in the ensuing sittings, the cause was set down for trial,

In this cause, the second point as to the deviation was abandoned; and on the first, the same evidence was given as upon the former occasion. The point was again fully argued for the defendant.

Lord Mansfield.—“ The single question on this policy is, Whether the ship sailed on her voyage to *Havre* before the 31st of *December*? She certainly sailed from *Pointe a Pitre* completely loaded before that time. The doubt on the first question of this sort was this: the policy was “at and from *Jamaica*,” now the word *at* certainly comprises the whole island, and, under that word, you may sail from one port to another every where along the coast of the island. The ship, therefore, in that sense, was still at *Jamaica*, after she had got to *Bluefields*. She did not leave *Bluefields* till after the day named in the warranty, and that place was quite out of the course of navigation from *St. Anne's* to *England*. I own at the trial, I thought the voyage to *England* did not commence till the ship sailed from *Bluefields*, and, according to my opinion then, a verdict was found for the defendant. But there was a doubt. I therefore wished (as I always do in such cases) that the opinion of the court might be taken in order to settle the point. The case, when it came on in court, was very ably argued; I was completely convinced, and the court were unanimously of opinion, that the voyage to *England* began when the ship sailed from *St. Anne's*; and upon the second trial, the plaintiff had a verdict. *Earle* and *Harris*, was still a stronger case. There an embargo was actually published, before the ship sailed, and the captain, immediately after crossing the bar, returned to make a protest, and sent his ship knowingly into the embargo: but he swore that he expected the embargo was to be taken off, and that he should proceed immediately upon his voyage; and the jury believed him. In this case to go by steps. There was public notification of a convoy to be at *Basseterre* on the 25th of *October*. The captain thought that it might be stopped a day or two at *Martinico*, and that he should get to *Basseterre* in time. He worked night and day, paid double fees for his papers, and sailed with full expectations

Earle v.
Harris, at
Guildhall,
Hil. Vac.
1780.

of pursuing his voyage directly. He knew of no embargo, and *Basseterre* was directly in his road. In that respect, this case differs strongly from *Bond v. Nutt*. He was even in the regular voyage obliged to pass under the cannon of *Basseterre*. He had his muster-roll, on condition of calling there; but he made no difficulty of taking it on that condition, because he knew he must pass that way at all events. Did he not *bonâ fide* begin his voyage? He certainly had no idea, when he sailed from *Pointe à Pitre*, of meeting with any stop. So it was in the former case of *Tbelluffon v. Fergusson*. There was no idea of the embargo in that case, when the ship sailed. Here there is not the least suspicion of fraud. This captain certainly did not know of the decision in *Bond v. Nutt*. He thought, when he was detained at *Basseterre* beyond the 31st of *December*, that the policy was forfeited, which is a strong circumstance in the plaintiff's favour, for it shews that the sailing was not colourable. This question has undergone the consideration of a special jury and of the court. Underwriters have a right to litigate questions, which seem to them to be in their favour. But, at last, there should be an end of litigation. If you should be of the same opinion with the former jury and the court, you will find for the plaintiff:" which they did accordingly. The cause of the twentieth underwriter, on the same policy, who refused to consolidate, stood next in the paper for trial; but upon the above verdict being given, his counsel consented that a verdict should also be entered against him.

The Grenada Case,
Vide *supra*.

From this long train of uniform and consistent determinations, it should seem that the question, what shall or shall not be a departure within the meaning of the warranty is now completely settled. In insurances *at and from London*, warranted to depart on or before a particular day, it has long been a question, what shall be a departure from the port of *London*; or rather what is the port of *London*: and it is singular that this point has never yet been judicially determined. On the one hand it is said, that the moment a ship is cleared out at the custom-house, and has all her cargo on board, if she quit her moorings in the river on or before the day warranted, that the warranty is complied with. On the other side it is contended, and with great appearance of reason, that a ship is not ready for sea, till she has got her custom-house cocket on board, which is the final clearance, and which

C H A P. XVIII. *she cannot have till she arrive at Gravesend : that till this cocke is received, the ship dare not proceed to sea under a penalty, and till then is not entitled to the drawbacks, and that Gravesend is always considered as the limits of the port of London, and unless the ship sailed from thence on or before the day limited, there is no inception of the voyage, and the policy is forfeited.*

Rogers v. Royal Exchange Assu. Comp. Sitt. in C. P. after Mich. 1787, before Lord Loughborough. In a late case, the Royal Exchange Assurance Company resisted a demand made upon them, in order to try this great question : but as it appeared from the evidence of the log-book that the ship did not in truth break ground till after the day named in the warranty, the plaintiff was nonsuited ; and the question remains undecided.

Pothew. Dict. tit. Convoy.

Emerigon, Traité des Assurances, p. 164.

The second species of warranty, which most frequently occurs in insurances, is that of sailing under the protection of convoy ; that is, certain ships of force, appointed by government, in time of war, to sail with merchantmen from their port of discharge to the place of their destination. When the nature of a convoy is considered, it is highly reasonable, that the policy should be forfeited, if the insured fail to comply with so material a condition ; because the risk, which the underwriter takes upon himself, is very considerably increased, in time of war, by the want of convoy. Accordingly, by the laws of this, and of all other maritime powers, if the insured warrant that the vessel shall depart with convoy, and it do not ; the policy is defeated, and the underwriter is not responsible. We have already seen, that every warranty must be strictly and literally complied with ; and that a liberal and substantial performance merely will not be sufficient. Hence in a warranty to sail with *convoy*, it becomes material to consider, what shall be deemed a *convoy* within such a condition. Upon this point it has been solemnly settled by the court of King's Bench, Mr. Justice *Willes* excepted, who differed from the other learned judges upon that occasion, that it is not every single man of war, which chuses to take a merchant ship under its protection, that will constitute such a *convoy* as a warranty means ; *but it must be a naval force under the command of a person appointed by the government of the country to which they belong.* The reason of such a decision is wise ; because government must be supposed to be better informed of the designs and strength of the enemy, and what degree of force would be sufficient to repel their attempts.

attempts. In the case, in which these points were settled, it also became a question, how far sailing orders from the commander in chief to the particular ship or ships, were requisite to the constitution of a convoy. But it was not thought necessary to decide that point, although it seemed to be the opinion of the majority of the judges, that they were not absolutely essential.

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This case came before the court upon a rule to shew cause why the verdict, which the defendant had obtained, should not be set aside and a new trial had. It was an action upon a policy of insurance on the ship *Arundel*, captain *Mann*, at and from *Jamaica* to *London*, warranted to depart with convoy. The insurance was at 18 guineas per cent. to return 3 per cent. if the ship sailed on or before the first of *August*. The facts appearing on the report of Lord *Mansfield*, who tried the cause, are these: On the 25th of *July* the *Arundel* sailed from *Morant* harbour to *Kingston*, where she met the *Glorieux* man of war, Captain *Cadogan*, who was likewise on his way to join Admiral *Graves* at *Bluefields*. Lord *Rodney* had appointed Admiral *Graves* to rendezvous at *Bluefields*, in order to take the fleet of merchant ships, which were to sail from thence upon the 1st of *August*, under his command, and to convoy them to *Great Britain*. Captain *Mann*, upon their meeting in *Kingston* harbour, asked for sailing orders from Captain *Cadogan*, who said, he had none, not having himself at that time joined the Admiral: but he was sure that Admiral *Graves* would not sail from *Bluefields* till the *Glorieux* joined him. However, if he should have sailed, he, Captain *Cadogan*, would give Captain *Mann* sailing orders, and take every care of the *Arundel* in his power. They proceeded together, and arrived at *Bluefields* on the 28th of *July*; but they found that Admiral *Graves* had sailed two days before. The *Glorieux* and *Arundel* then sailed from *Bluefields*, the former firing guns, giving signals, and behaving in every respect like a convoy. Upon the fifth of *August* a signal was made, that the fleet was in sight; and on the seventh they joined the fleet off *Cape Antonio*. The *Arundel* was afterwards lost in *September*, in a dreadful storm, which dispersed the whole fleet, and in which a vast number of the ships perished. Upon this evidence, the jury were of opinion, under the direction of the Chief Justice, that the terms of the warranty had not been performed, and they therefore found a verdict for the underwriters, the defendants. After

Hibbert v.
Pigou,
B. R. East.
23 Geo. III.
1783.

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this question had been fully argued at the bar, the three judges, Mr. Justice *Abbott* being, at that time, one of the Lords Commissioners of the Great Seal, delivered their opinions severally.

Lord *Mansfield*.—"Though the underwriters and insured are equally innocent; yet I cannot help saying, that now, as well as at the trial, my inclination led me to wish, that the plaintiffs were in the right. But the more it is argued, it is the less liable to dispute: There are hypothetical contracts and conditional contracts. In the former, the contract depends upon an event taking place; there is no latitude; no equity; the only question is, has that event happened. But conditional contracts admit of a more liberal construction. Now the only question upon this contract is, Whether this ship has departed with convoy? A great deal must be referred to the usage of merchants. The government appoints a convoy for the trade, and also names a place of rendezvous. Then comes the reference to the usage of merchants; the voyage is begun at *Kingston*; but the risk only commences at *Bluefields*. Now though Lord *Rodney* desires the captain of the *Glorieux* to take any ships he may pick up in his way, and convoy them to *Bluefields*; yet the warranty in the policy by the usage, does not require convoy to *Bluefields*. The second reference to the usage of merchants is, What is esteemed a convoy by merchants? *A convoy is a naval force, under the command of that person, whom government has appointed.* They trust to the knowledge of government, which must be supposed to be better acquainted with the plans and force of the enemy, and with the strength necessary to repel their attempts. Now this is the general usage, to which matters of this kind are referred. Then let us see what the case is here.—Lord *Rodney* appoints Admiral *Graves* to go with ten sail of the line to *Bluefields*; and from thence to convoy the *Jamaica* trade to *Great Britain*. When they come to the place of rendezvous, they take sailing orders from the Admiral, *which are essential to convoy*, as by them they know the signals, for what places they are to steer, in case of dispersion by storm, or any other just cause (a). Admiral *Graves*, on the

See post.
446 a.

(a) Since the two former editions of this work, I have met with a case of *Forbes v. Wilmot*, at *Guildhall*, July 1744, in the time of Lord Chief Justice *Lee*, where the ship insured had departed from *London*, and arrived at the *Dorset* and *August*, where the *Grafon* and *Lenox* (the convoy) were under sail, and the captain sent one of his men on board for sailing orders, which were refused; but the commodore said, "keep on,

and

the 26th of *July*, for reasons best known to himself, thinks he has got all the ships, for which he ought to stay, and proceeds on his voyage. He leaves no order for the *Glorieux* to follow him to *Cape Anthonio*; and though it is very true, that it is in the power of the Commander in Chief to change the place of rendezvous, yet in this case it is not true, as was supposed in argument, that *Cape Anthonio* was appointed. At the time of sailing from *Bluefields*, the *Glorieux* was no part of the convoy; for she did not come there till two days after the fleet was gone. Upon these facts it did appear to me, and to the jury at the trial, that the warranty was not complied with: I continue of the same opinion now; and that this rule should be discharged."

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Mr. Justice *Willes*.—"I cannot perfectly coincide with every thing which Lord *Mansfield* has laid down. The form of the contract is in general words "*to depart with convoy*," without mentioning any particular day, or pointing out any specific convoy. The terms of the policy seem to me to have been literally and substantially complied with; for there was no *laches* on the part of the *Arundel*; she came with all possible expedition, and was at *Bluefields* two days before the time appointed for sailing. When Captain *Mann* found that the fleet was gone, he did every thing in his power for the security of the ship; for he put himself under the protection of the *Glorieux*, which was appointed by Lord *Rodney* to make a part of the convoy: and it appears in evidence, that in every respect Captain *Cadogan* behaved as a convoy. I have searched a good deal for cases; and I can only find one in *Strange*, 1250, upon the subject of sailing orders; and I do not think that case goes so far as to say, that sailing orders are essential to a convoy. The loss of the *Arundel* happened long subsequent to her joining the fleet; and I am therefore of opinion, that the warranty in this policy has been substantially performed."

Vide post.
P. 453.

Mr. Justice *Buller*.—"In deciding this case, it is not necessary to say, whether sailing orders are essential or not: as at present advised, I do not say that they are absolutely necessary. The

"and I will take care of you;" and the ship being lost that night by striking on the shore, the question was, If the ship was put under convoy, having no sailing orders? And it was held she was, and the plaintiff had a verdict. Note to the third edition.

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present question is simply this: Did the *Arundel* sail with convoy? This is a condition which must be literally complied with, as all the cases agree. As to the question itself, it is undoubtedly a question of fact: and the facts of the case seem to me to prove, that the *Glorieux* was no part of the convoy. Admiral *Graves* had sailed before they arrived; and that circumstance, which my Lord stated, seems very material, that no orders were left behind for the *Glorieux*. I say that, on this evidence, she was not a part of the convoy: for in order to make her so, it must appear that she was under the orders of *Graves*. Did he leave her behind to take care of the ships that remained? If so, it would alter the case very materially. But there was no such idea; for if there had, the *Glorieux* would have remained at *Bluefields* for the rest of the ships, until the 1st of *August*: on the contrary, Captain *Cadogan*, finding that Admiral *Graves* was gone, immediately followed; for his sole object was to join Admiral *Graves*. *Ships must sail under the convoy appointed by the government of the country, who proportion the strength of it to the necessity of the times. To what end would this care be taken, if merchantmen were to sail under the protection of single ships, with which they may happen to meet? I am therefore of opinion, that if a ship do not sail with the convoy appointed by government, it is not a sailing with convoy, within the terms of the policy."* The rule for a new trial was therefore discharged (a).

Webb v.
Thomson,
1 Bof. &
Pull. 5.

This question respecting the necessity of having sailing instructions from the commander of the convoy came on to be considered in the Court of Common Pleas, upon a motion for a new trial, when Mr. Justice *Buller*, in the absence of Lord Chief Justice *Eyre*, said, "Had not my Lord mentioned that the verdict was entirely to his satisfaction, I should not decide upon this application in the first instance. The case is here brought to a question of law. *In point of law, then, the general proposition is, that sailing instructions are necessary.* I have never decided this

Sittings at
Guildhall
before Mr.
Just. Buller,
after Easter
Term 1784.

(a) Another action was brought upon the same policy against another of the underwriters; and although a verdict in that case was found for the plaintiffs: yet it seems to me to leave the doctrines above advanced unshaken: for upon the second trial it was proved, beyond all doubt, that the *Glorieux* was in truth a part of the convoy, a fact, which was left doubtful on the first; and it was upon that fact that Lord Mansfield and Mr. Justice Buller chiefly relied.

case

case myself, but it has often been determined at *Guildhall*. I do not say that there may not be cases in which they may be dispensed with. In *Hibbert v. Pigou*, my expression is, "It is not necessary to say, whether sailing orders are essential or not; as at present advised, I do not say that they are absolutely necessary." The case of *Victoria v. Cleeve* goes no further. If the captain, from any misfortune, from stress of weather, or other circumstances, be absolutely prevented from obtaining his instructions, still it is a departure with convoy: but then he must take the earliest opportunity to obtain them. Generally speaking, unless sailing instructions are obtained, the warranty is not complied with: the captain cannot answer signals; he does not know the place of rendezvous in case of a storm; he does not in effect put himself under the protection of the convoy, and therefore the underwriters are not benefited." The other judges concurred in this opinion.

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See post.
453.

In a still later case, in an action on a policy of insurance on the ship *Potomack*, at and from *Jamaica to London*, warranted to depart with convoy from the place of rendezvous on or before the 1st of *August 1705*: it was admitted that the vessel never had got so near to the admiral, who had in fact left the place of rendezvous before the *Potomack* arrived there, as to obtain sailing orders, when he lost sight of the convoy, and was afterwards taken. The plaintiff's object was to get a decision upon the point, *How far sailing instructions were essential to the sailing with convoy?*

France v. Kirwan,
Sittings at
Guildhall
after Mich.
38 Geo. 3.

See a very
elaborate
judgment of
Lord Eldon
on this point
& Pull. 264.

in the case of *Anderson v. Pitcher*, 1 Bo.

Lord *Kenyen* expressed the strong inclination of his opinion to be, that they were essential, but would not decide it, as this vessel had never in fact joined. The plaintiffs were nonsuited.

Although the decisions of the courts of common law require no additional authority to support them; yet it will be proper, merely by way of illustration, to point out to the reader, in what cases the opinions of foreign writers agree with the determinations of the *English* courts of justice. Monsieur *D'Emerigon*, a very distinguished *French* writer upon this branch of jurisprudence, puts this case: "On avoit fait des assurances sur un navire, de sortie de *Marseille* jusqu'aux *Detroits de Gibraltar*, et dans la police il étoit dit que le navire partiroit de *Marseille* sous l'escorte d'un bâtiment de roi; autrement, assurance

Emerigon,
p. 171.

C H A P. " *nulla*. Une fregate, chargée de munitions de guerre pour
 XVIII. " *Algebras*, se trouvoit à l'*Effaque*. Le navire assuré mit à la
 voile sous les auspices de cette fregate, qui lui accorda pro-
 tection, et qui parut en meme temps. Consulté sur ce cas,
 je fus d'avis que si le navire étoit pris par les ennemis, les as-
 sureurs seroient fondés à refuser le payment de la perte : car
 " *autre chose est d'être sous l'escorte d'un bâtiment du roi, et autre chose*
 " *est de naviguer simplement sous ses auspices.*"

See the case. From the case of *Hibbert and Pigou* we collect this; that a
 convoy appointed by the admiral commanding in chief upon a
 station abroad, is a convoy appointed by government. And be-
 sides the instruction it affords, applicable to the particular sub-
 ject, for which it was here inserted, it serves to establish some
 principles laid down at the beginning of this chapter; that whe-
 ther the loss do or do not happen, on account of the breach of
 the warranty, still the policy is forfeited: for in that case, the
 ship insured perished in a storm, long after she had joined the
 regular convoy; and consequently the loss did not happen, on
 account of the breach of the condition.

Having seen what shall be deemed a convoy, let us proceed
 to consider what shall be a *departure with convoy*, within the
 meaning of a warranty to *depart with convoy*. The rule on this
 point is short and clear, that such a warranty implies, that the
 ship shall go with convoy from the usual place of rendezvous,
 at which the ships have been accustomed to assemble; as *Spit-*
head, or the *Downs*, for the port of *London*; and *Bluefields* for
 all the ports in *Jamaica*. And from the particular port to such
 usual place of convoy, the ship is protected by the policy.

Lethbridge's Thus in an action on a policy of insurance by the defendant at
 case, 2 Salk. *London*, insuring a ship from thence to the *East Indies*, warranted
 445. to *depart with convoy*; the declaration states, that the ship went
 from *London* to the *Downs*, and from thence with convoy, and was
 lost. After a frivolous plea and demurrer, the case stood upon
 the declaration, to which it was objected, That here was a de-
 parture without convoy.

Per Curiam. The clause, warranted to depart with convoy, must be con-
 strued according to the usage among merchants; that is, from
 such place, where convoys are to be had, as the *Downs*, &c.

It is true, Lord Chief Justice *Holt*, upon that occasion, was of a different opinion; but the judgment of the other judges was relied upon, and confirmed in the following case by Lord Chief Justice *Lee*, and has also been recognized in several other cases, in which the question has come collaterally before the Court. Indeed, of late years, it has been tacitly acquiesced in; for there never was a convoy from the port of *London*.

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On an insurance from *London* to *Gibraltar*, warranted to depart with convoy, it appeared that there was a convoy appointed for that trade at *Spithead*, and the ship *Ranger* having tried for convoy in the *Downs*, proceeded for *Spithead*, and was taken in her way thither. The insurers insisted, that this being the time of a *French* war, the ship should not have ventured through the *Channel*, but have waited in the *Downs* for an occasional convoy. And many merchants and office-keepers were examined to that purpose. But Lord Chief Justice *Lee* held, that the ship was to be considered as under the defendant's insurance to a place of general rendezvous, according to the interpretation of the words, "warranted to depart with convoy." *Salk.* 443. And if the parties meant to vary the insurance from what is commonly understood, they should have particularized her departure with convoy from the *Downs*. The jury was composed of merchants, who found for the plaintiff, upon the strength of this direction.

Gordon v
Morley,
2 Stra. 1265.

A similar decision was made in the year 1781, by the Admiralty of *France*, which is reported in the work of *Emerigon*.

Tom. 1.
p. 166.

Upon this kind of warranty, it is to be observed, that although the words commonly used are, "to depart with convoy," or, "to sail with convoy;" yet they extend to failing with convoy throughout the whole of the voyage, as much as if those words were inserted. Indeed to suppose the contrary would introduce an infinite variety of frauds; as a ship would sail out of harbour with the convoy, continue with it for an hour or two, then leave it, and run every peril, at the risk of the underwriter. If, therefore, the convoy is only to go a part of the way, that is not a compliance with the warranty; and the insurer is discharged from his engagements.

2 Salk. 443.

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3 Lev. 320.

This was one of the points ruled in *Jeffreys v. Legendre*, that will be quoted at length presently, in which Lord Chief Justice Holt and the rest of the Court held, that although the words of the policy only were "to depart with convoy," yet they extend to sail with convoy throughout the whole voyage.

In a more modern case, however, this doctrine came again in question; and after very full consideration, the opinion of Lord Holt was unanimously confirmed by the whole Court of King's Bench.

Lilly v.
Ewter,
Doug. 72.

It was an action for money had and received, brought against an underwriter for a return of premium. The policy was on the ship the *Parker Galley*, "at and from Venice to the Current Islands, and at and from thence to London," at a premium of five guineas per cent. "to return 2 per cent. if the ship sailed with convoy from Gibraltar, and arrived." The ship touched at Gibraltar on her way home, and sailed from thence under convoy of the *Zephyr* sloop of war, but the convoy was destined only to go to a certain latitude, about as far as Cape Finisterre, being ordered on the Lisbon station; and accordingly the ship and convoy separated, and the ship arrived safe at London. The only question in the case was, Whether, by the terms of the policy, the condition for the return of premium was a departure from Gibraltar with such convoy as could be met with, for whatever part of the voyage that might happen to be, or a departure with convoy for the voyage? The trial came on before Lord Mansfield and a common jury, when a verdict was found for the plaintiffs.

A rule having been obtained to shew cause why there should not be a new trial: the evidence from his Lordship's report appeared to be thus: That the plaintiffs had called witnesses (one of whom was Mr. Gorman, an eminent merchant) to prove that for some years past, when convoy for the voyage, or the whole voyage was intended, those explanatory words had been added, and that, by this usage, the expressions of "sailing with convoy," and "sailing with convoy for the voyage," had received distinct technical meanings: "with convoy," signifying whatever convoy the ship should depart with, whether for a greater or less part of the voyage. Several policies were also produced, which

had been filled up at the office of the same broker, who had prepared that which had given occasion to this cause, in which the words "for the voyage," or "for *England*," were added. The captain proved, that at the time when he left *Gibraltar*, no other convoy was to be had. The witnesses for the defendant swore, that they understood the words "with convoy," to mean, *convoy for the voyage*; and the broker said, that, at the time this policy was signed, he understood and apprehended it was so understood by all the parties, that the convoy was to be for the voyage, and that the return was such as was usual, when convoy for the voyage was meant. His Lordship, after stating the evidence, said, that when the case was opened, he thought, on the face of the policy, that the words must mean for the voyage. He had not admitted the counsel to ask the opinion of the witnesses on the construction; but to learn whether there was any usage in this case, which would give a fixed technical sense to the words. This was a question of fact to be ascertained by evidence, and proper for the consideration of a jury.

The case was fully argued at the bar.

Lord *Mansfield*.—"On the words I was strongly of opinion, that the policy meant a departure with convoy intended for the voyage. The parties could not mean a departure with convoy, which might be designed to separate from the ship in a minute or two; though when convoy for the whole of a voyage is clearly intended, an unforeseen separation is an accident, to which the underwriter is liable; for the meaning of such a warranty is not that the ship and convoy should continue and arrive together. But I still think that the evidence was properly admitted at the trial of this cause; because the sense contended for by the plaintiffs, was not inconsistent with the words of the policy, and therefore it was material to see what the usage was. I laid great stress on Mr. *Gorman's* testimony. I did not consider him as a common witness. However, it seems, from what I have heard since, that people in the city are dissatisfied with the verdict, and think the evidence of the plaintiff's witnesses was founded on a mistake. Certainly critical niceties ought not to be encouraged in commercial concerns; and wherever you render additional words necessary, and multiply them, you also multiply doubts and criticisms. It may be hard, be-
cause

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cause words have been added in some instances, to force a construction in this case, from the omission of them. The question is of great importance."—The rule therefore was made absolute.

Doug p. 74.
note (7):

The new trial came on before Lord *Mansfield* at the sittings after *Trinity* term, 19 *Geo.* 3. when the verdict was found for the defendant, the insurer.

Doug. 73.
Emerigon,
166.

But although it has been thus settled, that a ship must depart with convoy for the whole of the voyage; yet in the last case, it was truly said by Lord *Mansfield*, that an unforeseen separation is an accident, to which the underwriter is liable. It is the law of reason and common sense; for it would be the height of injustice and cruelty to heap misfortune upon misfortune, and to say, that because a ship has been separated from her convoy by stress of weather, or the fury of the elements (perils insured against by the policy), that the insured shall suffer still greater misery, by being deprived of that indemnity which he had secured to himself by paying a sufficient and adequate premium. The law of *England* does not tolerate such principles: and the first decision upon the subject was such, that it never has been departed from in any instance,

Jeffrey v.
Legandra,
3 Lev. 320.
2 Salk. 443.
Carth. 216.
1 Show.
120. 4
Mod. 58.
S. C.

Assumpsit on a policy of insurance made in the usual form, "from *London* to *Cadiz*, warranted to depart with convoy." Upon the general issue pleaded, the jury found a special verdict, stating, that the ship did depart from the port of *London*, in company of the convoy intended, and sailed together as far as the *Isle of Wight*, in pursuance of the voyage towards *Cadiz*; and there they were separated by stress of weather; that the convoy put into *Torbay*, and the insured ship into the port of *Fowey* in *Cornwall*. That three days afterwards, the wind setting right to bring the convoy down the channel, the master of the insured ship sailed out of *Fowey* on purpose to meet the convoy; but it did not come: and then the insured ship was seized with another storm, so that she could not return from whence she came, but was driven upon the *French* coast, and there taken by the enemy.

Carth. 216.

After several arguments of this special verdict, the plaintiff had judgment *per totam curiam*; and their principal reason was, because there was no manner of neglect, or other default found in

in the master of the ship ; but it appeared he had done all in his power to keep in company of the convoy. It is found expressly, that he departed with convoy from his first port, which answers the words of the policy : but it would have been otherwise, if any fraud or neglect had been found in the master of the insured ship after his departure, notwithstanding he departed out of the first port with convoy ; for the meaning of the words “ *warranted to depart with convoy* ” is, that the insured ship should keep company with the convoy, during the whole voyage, if possible.

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Even where the ship has by tempestuous weather been prevented from joining the convoy at all, at least, of receiving the orders of the commander of the ships of war, if she do every thing in her power to effect it, it shall be deemed a sailing with convoy, within the terms of the warranty.

As to this point, see the cases ante, p 443. et. seq. and probably some doubt may arise as to the following case.

The plaintiff had insured on goods in the *John and Jane*, from *Gottenburgh* to *London*, with a warranty *to depart with convoy* from *Fleckery*. In *July 1744*, the ship sailed from *Gottenburgh* to *Fleckery*, and there she waited for convoy two months. On the 21st of *September*, at nine in the morning, three men of war, who had one hundred merchant ships in convoy, stood off *Fleckery*, and made a signal for the ships there to come out, and likewise sent in a yaul to order them out. There were fourteen ships waiting, and the *John and Jane* got out by twelve o'clock, and one of the first ; the convoy having sailed gently on, and being two leagues a-head. It was a hard gale, and by six in the afternoon, the ship came up with the fleet ; but could not get to either of the men of war for sailing orders, on account of the gale of wind. It was stormy all night, and at day-break the ship in question was in the midst of the fleet ; but the weather was so bad, that no boat could be sent for sailing orders. A *French* privateer had sailed amongst them all night : and it being foggy on the 22d, attacked the *John and Jane* about two, who kept a running fight till dark, which was renewed the next morning, when she was taken. For the defendant it was insisted, that this ship was never under convoy, nor is ever considered so, till they have received sailing orders ; and if the weather would not permit the captain to get them, he should have gone back.

Victoria v.
Cleves,
2 Stra.
1250.

But

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Sir William
Lee.

But the Chief justice and the jury were both of opinion, that as the captain had done every thing in his power, it was a departing with convoy: and those agreements are never confined to precise words; as in the case of departing with convoy from London, when the place of rendezvous is *Spithead*, a loss in going thither is within the policy. So the plaintiff recovered.

But it is evident from all that has been said, that if there be an opportunity of convoy; if the convoy throw out repeated signals to join; and by the negligence and delay of the captain of the insured ship, the opportunity be lost, the warranty to depart with convoy is not complied with, and the underwriter is discharged.

Taylor v.
Woodnass,
Sittings at
Gulldhall,
Hil. Vac.
4 Geo. 3.

Thus in an action on a policy of insurance tried before Lord Mansfield, the plaintiff was nonsuited, there being a warranty to depart with convoy; and it appearing from the evidence, that the commodore of the convoy had made signals for sailing from *Spithead* to *St. Helen's* the night before, and had made repeated signals the next morning from seven o'clock till twelve, notwithstanding which, the ship insured had neglected to sail with him, and did not sail till two hours after, in consequence of which she was taken by a privateer (a).

Although we have thus seen, that a ship must not voluntarily depart from convoy during the voyage (b), yet this species of warranty must always be construed with reference to the usage of trade, and to the orders of government. For if the course upon a particular voyage has been to have a relay of convoy, protecting the trade from one port to another; or if government appoint a convoy to escort the trade of a place to a given latitude and no farther; and there be no other convoy on that station, a vessel, taking the advantage of such a convoy, has complied with the warranty to sail with convoy for the voyage.

Smith v.
Readthrw,
London,
Sittings at
Eas. 1782.

Thus in an insurance on the ship William, "at and from London to Jamaica," warranted to depart with convoy for the voyage,

(a) As to the duty of the officers appointed for convoy to merchant ships, see it prescribed in the Stat. of the 13 Car. 2. & c. 17, which regulations were confirmed by the 22d of Geo. 2. c. 33. & c. 2. art. 17.

(b) This is now prohibited by statute. See post. p. 456.

Lord

Lord *Mansfield*, in the course of his summing up to the jury, said, "A warranty to sail with convoy means with such a convoy as government pleases to appoint; and whether it consists of separate ships at different stations or not, it is a convoy for the voyage; therefore on that point there is no doubt."

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The same doctrine was held by Lord *Kenyon*, in an action on a policy of insurance *at and from Cadiz to Amsterdam, warranted to sail with convoy for the voyage*. The ships insured had sailed from *Cadiz* under a *British* convoy; and were lost before they reached the *Downs*, where it was alleged they were to have taken a fresh convoy for *Amsterdam*. The underwriters insisted that the convoy should have been direct to *Amsterdam*. The assured, on the other hand, contended, that all convoy must be according to usage, and that in many voyages there is no such thing as a direct convoy, but that the vessels proceed by relays of convoy from stage to stage. The special jury, with Lord *Kenyon's* approbation, gave a verdict for the plaintiffs. And although in that case, it is true, the underwriter had adjusted the policy *with full knowledge* of all the circumstances, which his lordship seemed to think conclusive, yet there were other causes on the same policy, where there was no adjustment; and upon Lord *Kenyon* and the jury declaring that, without considering the adjustment, they thought the warranty had been complied with, the plaintiff had a verdict, and no motion was ever made for a new trial in any of these causes.

De Garry
v. Clagget,
London,
Sit. after
Mich. 1795.

So also the Court of Common Pleas decided in an action on a policy on the ship *Little Betsy*, at and from *London to St. Sebastian, warranted to sail with convoy*. The ship sailed with other vessels under convoy of several ships of war: and after a certain latitude, the *Weazel*, one of the men of war, was detached to convoy the *Spanish* ships; but the captain of that ship had orders to go with the *St. Sebastian* ships no further than *Bilboa*, and in fact he went no farther. A verdict passed for the plaintiff. When the case came on before the Court on a motion for a new trial, it was argued for the underwriters, that warranties are to be strictly complied with; and that however near the port of *St. Sebastian* might be to *Bilboa*, yet the principle was the same; and that a convoy to the latter place could no more be construed to be a convoy to the former, than a convoy to the *Cape of Good*

D'Eguise v.
Bewick,
2 H. Black.
551.

C H A P. *Hope* could be a convoy to the *East Indies*, and for this was cited
 XVIII. *Hibbet v. Pigou* (supra 443).

Mr. Justice *Buller*.—"The case of *Hibbet* and *Pigou* is not applicable to this, for there a convoy was appointed and actually sailed from *Jamaica* to *England*; as to the instance put at the bar of a convoy to the *Cape of Good Hope*, I entirely differ from the counsel on that point; for if government thought a convoy to the *Cape* was a sufficient protection to the *East India* trade, and the usage were for the *East India* ships to sail with a convoy only to the *Cape*, and to consider that as the *East India* convoy, and no other convoy was appointed to the *East Indies*, I should hold that the warranty was complied with; though I agree if there was another convoy to the *East Indies*, it would be otherwise. The captain of a merchant ship has nothing to do with, nor can he know the instructions from the Admiralty to the king's officers, but must take such convoy as he finds. I am therefore of opinion that there is no ground at all for this motion."

Mr. Justice *Heath*.—"I am of the same opinion. The owner of a ship, when he makes an insurance, cannot know the orders of the Admiralty respecting convoys."

Mr. Justice *Rooke*.—"The ground stated at the bar seems to me to be more fit for the jury than the Court, and the jury have found that the convoy was sufficient."

Lord Chief Justice *Eyre*.—"I am satisfied with the finding of the jury,"

The rule for a new trial was therefore refused.

38 Geo. 3.
c. 76. The sailing with convoy has added so much to the security of our commerce in time of war, that in the year 1798, an act of parliament passed for the purpose of compelling ships to sail with convoy, and by which also a considerable revenue was intended to be raised.

100. 1. The first section of this act provides, that it shall not be lawful for any ship or vessel belonging to any of his majesty's subjects (except as therein-after is excepted) to sail or depart from any

any port or place whatever, unless under the convoy and protection of such ship or ships as may be appointed for the purpose. C H A P.
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That the master or other person having the charge or command of every such ship or vessel, which shall sail or depart under the protection of convoy, shall and is thereby required to use his utmost endeavours to continue with such convoy during the whole of the voyage, or during such part thereof as such convoy shall be directed to accompany and protect such ship, and shall not wilfully separate or depart therefrom upon any pretence whatever, without order or leave for that purpose from the officer having the command of such convoy. Sec. 2.

It is also enacted that if the master or commander of any ship which is by this act required not to sail without convoy, shall sail without convoy; or having sailed with convoy shall wilfully depart therefrom, without leave first obtained from the person entrusted with the charge of such convoy, every such master shall forfeit 1000*l.* and in case the whole or any part of the cargo consisted of naval or military stores, the penalty is 1500*l.* with a power in the Court, where the action may happen to be brought, to mitigate the penalties, so as they are not reduced to a less sum than 50*l.* Sec. 3.

By section the fourth, it is provided that in case of a sailing without, or a wilful desertion of, convoy, every insurance or contract or agreement for any insurance upon such ship, or goods, wares or merchandize laden thereon, or upon any property, freight, or other interest arising out of the same, whereon insurances may lawfully be made (and which shall be the property of the master or commander of the ship, so sailing without convoy, or wilfully quitting the same, or of any person interested in such vessel or cargo, who shall have directed, or been any way privy to, or instrumental in, causing such ship or vessel to sail without convoy, or wilfully to separate therefrom), shall be null and void, to all intents and purposes both at law and in equity, any contract or agreement to the contrary notwithstanding; and that nothing shall be recovered thereon by the assured for loss or damage, or for the premium, or consideration in nature of a premium, which shall have been given for such insurance; and Sec. 4.

C H A P. if any party to such insurance, or any broker or other person
 XVIII. shall transact a settlement on such insurance, or allow any money
 in account, on such insurance, every such person shall forfeit 200*l*.

Sec. 5. It is also provided, that the officers of the customs shall not permit vessels to clear outwards, till they have given bond, with one surety, in the penalty of the value of the ship, with condition that the ship shall not sail without, nor wilfully desert the convoy.

Sec. 6. By the sixth section, this act is not to extend to vessels, not
 28 June required to be registered by any acts then in force; nor to any
 1798. ship, having a licence signed by the Lords of the Admiralty to
 A foreign- sail without convoy, or by such persons as shall be duly autho-
 built ship, rized by them for that purpose; or to any ship proceeding with
 British-owned, due diligence to join convoy from the port or place at which the
 ed, is not re- same shall be cleared outwards, in case such convoy shall be ap-
 quired to be pointed to sail from some other port or place, except as to the
 registered, bond hereby required to be taken upon the clearance outwards;
 and may or to any ship bound to or from any port in *Ireland*; or to ships
 therefore sail bound from one port to another in *Great Britain*; nor to ships
 without con- in the service of the *East India*, or *Hudson's Bay*, companies.
 voy, being
 within the
 exception in
 this clause
 of the sta-
 tute. Long
 v. Duff,
 2 Bos. &
 Pull. 209.
 Sec. 8.

By the eighth section, the act is not to extend to ships sailing from foreign ports, in case no convoy is appointed by the Lords of the Admiralty of *England*, or persons authorized by them at such foreign ports to appoint convoys, or to grant licences for sailing without convoy.

Sec. 9. The Lords of the Admiralty are to give notice in the *Gazette* that masters of ships shall have on board, flags and vanes for the purpose of distinction, and of answering signals; and without having which they are not to be cleared outwards.

Sec. 10. So much of the act of the 33 *Geo. 3.* ch. 66. sec. 8. as makes the masters of ships under convoy liable to be articted in the Court of Admiralty for disobeying signals or other lawful commands of the commodore, or deserting convoy, and finable at the discretion of the said court, in any sum not exceeding 500*l*. and punishable by imprisonment, not exceeding one year, shall be

be painted on a board, and affixed on some conspicuous and convenient part of every ship which by this act is required not to sail or depart without convoy; and that in default thereof every master or other person, having the charge or command of any such ship, shall forfeit, for every such offence, the sum of 50*l*.

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The eleventh section directs, that if any ship, required by this act not to sail without convoy, shall be in imminent danger of being taken by the enemy, the commander of the ship shall make signals by firing guns to convey information of his danger to the rest of the convoy, as well as to the ships of war under the protection of which he is sailing; and that in case he is taken possession of, he shall destroy all instructions confided to him, relating to the convoy; and every commander wilfully neglecting to make such signals, or to destroy such instructions, shall, for every such offence, forfeit a sum not exceeding 100*l*. S. 11.

The remainder of this statute is employed in directing how the duties shall be raised and collected.

The third and last species of warranty, which falls under our consideration, is that of neutrality; or that the ship or goods insured are neutral property. This condition is very different from either of the two former; for if this warranty be not complied with, the contract is not merely avoided for a breach of the warranty, but it is absolutely void *ab initio*, on account of fraud. This ground was entered upon in the chapter of fraud; and the principle, on which the difference turns, is this. A man may warrant that his ship shall sail with convoy; and if that condition be not complied with, it is not his fault, because it depends upon the acts of other men: but still he is the sufferer, for he loses the benefit of his contract. So also if he warrant to sail on a particular day, and do not, he is guilty of no crime; for that was a circumstance, the performance of which depended on a thousand accidents, such as wind, weather, repair, &c.: but as he had expressly undertaken, he loses the effect of his policy by non-compliance. But in neither of these cases, as I have said, is the insured, making such a warranty, guilty of any offence. Not so with him, who warrants property to be neutral. That is a fact, which, at the time of insuring, must be within his own knowledge; and if he assert it to be neutral, knowing it

Vide c. 10.

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to be otherwise, he is guilty of a wilful and deliberate falsehood, and incurs moral turpitude. In such a case, therefore, the contract between the parties is absolutely null and void to all intents and purposes.

Woolmer v.
Mullman,
4 Burr.
1419.
1 Bisc. Rep.
427. Vide
ante, p. 244.

Thus on a special case reserved for the opinion of the Court, it appeared that an action was brought for the recovery of a total loss on a policy of insurance made on goods, on board the ship *Bona Fortuna*, at and from *North Bergen* to any ports or places whatsoever, until her safe arrival in *London* "*warranted neutral ship and property.*" The ship, with the goods so being on board her, after her departure from *North Bergen*, and before her arrival at *London*, proceeding on her voyage, was, by force of the winds, and stormy weather, wrecked, cast away, and sunk in the seas; and the said goods were thereby wholly lost. The ship called *La Bona Fortuna*, at and before the time she was lost, *was not neutral property*, as warranted by the said policy. The question was, Whether under such circumstances, the plaintiff could recover? Lord *Mansfield*, after hearing counsel for the plaintiff, stopped those for the defendant, saying, the point was too clear to be argued. There was a falsehood, with respect to the thing insured; for he insured neutral property, when it was not so: therefore there is *no contract*. We must give judgment for the defendant.

Tabbs v.
Bendelack,
Sitz. after
Tr. 1801.
4 Esp. 108.
and 3 Bos.
& Pull.
207. note.
6. C.

An *American* by birth, who has resided for some years with his family in *England*, though himself has been occasionally in *America*, is so far to be considered as a *British* subject; that if a ship of his be warranted *American* property it is not to be deemed so, though the vessel was built in *America* and registered there, and such a plaintiff in an action upon a policy of insurance was non-suited.

If, however, the ship and property are neutral at the time when the risk commences, this is a sufficient compliance with a warranty of neutral property; because it is impossible for the insured to be answerable for the consequences of a war breaking out during the voyage. The insurer takes upon himself the risk of peace or war; they are public events, equally known to both parties.

The

The plaintiffs insured the ship the *Yonge Herman Hiddinga*, and her cargo, "at and from *L'Orient* to *Rotterdam*, warranted a "neutral ship and neutral property." The ship being captured in the course of her voyage by some *English* men of war, the plaintiffs brought this action against the defendant, one of the underwriters on the policy, stating in their declaration, that the defendant subscribed the policy on the 28th of *November* 1780, and averring that the ship and cargo were at that time, neutral property. The trial came on before Lord *Mansfield* at *Guildhall*, when a verdict was found for the plaintiffs, subject to the opinion of the court upon a case stating, that the ship in question sailed from *L'Orient*, on the voyage insured, on the 11th of *December* 1780, having the insured cargo on board, and both the ship and cargo were neutral property at the time of the ship's departure from *L'Orient*, and so continued until the 20th of *December* 1780, on which day hostilities having commenced between the *English* and the *Dutch*, the *Dutch* ceased to be a neutral power, and the ship and cargo ceased to be neutral property. They were taken on the 25th of *December* 1780, and condemned as lawful prize, in the Admiralty court, on the 19th of *February* 1781.

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Eden and
another v.
Parkinson,
Doug. 732.

Lord *Mansfield*.—"Many points have been gone into in the argument on both sides at the bar, which are not necessary for the decision of this case. For instance, there is no doubt but you may warrant a future event. But the single question here is, What is the meaning of this policy? I had not a particle of doubt at the trial, and I know the jury had none; but Mr. *Lee* pressed for a case, and I granted one out of respect to him. What is the case? It is an insurance upon a ship and her cargo, at and from *L'Orient* to *Rotterdam*. The insured warrant them neutral, and the defendant would have the court to add, by construction, "and so shall continue during the whole voyage." The contract is not so. The insured tell the state of the ship and goods then, and the insurers take upon themselves all future events and risks, from men of war, enemies, detentions of princes, &c. The parties themselves could not have changed the nature of the property; but they did not mean to run the risk of the war. If it made a difference what country the property belonged to, the underwriters should have enquired. The risk of future war is taken by the underwriter of every policy. By an implied warranty every ship must be tight, staunch, and

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Vide ante,
c. 11.

Vide supra.

strong; but it is sufficient if she be so at the time of her sailing. She may cease to be so in twenty-four hours after her departure, and yet the underwriter will continue liable. The case of *Lilly v. Ewer* turns quite the other way. The decision there was, that the ship must sail with convoy, according to the usage of the trade; that is, convoy destined to go as far as usual in that voyage. The present is the clearest case that can be. The warranty is, that things stand so at the time; not that they shall continue."

Mr. Justice *Willes* and Mr. Justice *Ashbursh* concurred.

Mr. Justice *Buller*.—"The case of *Lilly v. Ewer* is much against the defendant, for it was not contended there that the ship must continue with the convoy during the whole voyage." The *postea* was delivered the plaintiffs.

Vide infra.

And afterwards in a subsequent case of *Saloucci v. Johnson*, in the course of the argument, Mr. Justice *Buller* said; I do not agree with the counsel, who contend, that the property must continue neutral during the whole voyage: if it be neutral at the time of sailing, and a war break out the next day, the underwriter is liable.

Tyson and
another v.
Gurney
3 Term Rep.
477.

And in a still later case, which came on for trial before Lord *Kenyon* at *Guildhall*, this point was one amongst others saved for the opinion of the Court of King's Bench. But when the case came on to be argued, the counsel for the defendant abandoned the objection upon the authority of *Eden v. Parkinson*; and *Saloucci v. Johnson*; so that this point may now be considered as for ever closed.

Having seen what shall be deemed a compliance with a warranty, asserting that the property insured is neutral; and having also considered what effect the breach of such a warranty has upon the contract of insurance; it may be proper to observe, before this chapter is closed, how far our courts of law hold the sentences of foreign courts to be conclusive evidence, that the property was not neutral; so as to discharge the underwriters.

Before we proceed to the consideration of the effect of their sentences, it is proper to observe, that the foreign courts here alluded

alluded to, the sentences of which are in any case to be held conclusive, must be such courts as are constituted according to the law of nations, exercising their functions within the belligerent country; a court of that state, to which the captor belongs, held within its own territories. If therefore a *British* ship be captured by a *French* privateer, and carried into *Bergen* in *Norway*, a neutral state, and there condemned by the *French* consul, the sentence is contrary to the law of nations, and illegal; and if after such a sentence, the owner re-purchase his ship at a publick auction, he cannot recover the re-purchase money from the underwriter. Such a contract is in the nature of a ransom, and illegal. The court of King's Bench, in deciding the above point, said, it was a question affecting all commercial states, and the point had lately been solemnly decided by Sir *William Scott* (the Judge of the High Court of Admiralty), upon grounds that would recommend the decision to all those who filled judicial situations (a).—It is certain, indeed, that the decision of a *French* consul in a neutral country can only be considered as the act of a person destitute of all authority, except over the subjects of his own country, and possessing that, merely by the indulgence of the country in which he resides; and who can have no pretence to exercise a jurisdiction in that neutral country in any matter, particularly in the matter of prize of war, in which the subjects of other states may be concerned.

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Have'ock v.
Rockwood,
8 Term Rep.
258.

See the case
of *Flad*
Oyen. Dr.
Robinson
Caf. in the
Admiralty,
v. 1. p. 135.

But sentences of condemnation procured by the captors in the country of a co-belligerent, or ally in the war, have been held to be good.

Oddy v.
Bovill.
2 East's
Rep. 473.

But of the sentences of foreign courts of Admiralty, duly constituted, the courts of justice in *England* will take notice; and if they have proceeded to decide the question of property will be held to be conclusive.

Hughes v.
Cornelius,
2 Show. 232.
2 Ld. Raym.
893. 936.

(a) It was my intention to have inserted the very learned judgment of Sir *Wm. Scott*, in the case of the *Flad Oyen* at length: but I forbear to do so, as it is now published at length in the 8 Term Rep. p. 270. note (a); and also a full report of the cause in Dr. *Robinson's* late valuable and accurate Reports of Cases argued and determined in the High Court of Admiralty. See also the case of the *Christopher*. 2. Rob. 209. and the case of the *Betsy, Kruger*. 2 Rob. 210. n. for the distinction between a condemnation in a neutral country, and one in the country of a co-belligerent, and which distinction was adopted by the Court of King's Bench in the case of *Oddy v. Bovill* mentioned in the text.

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In the first case as to the effect of foreign sentences upon the contract of insurance and warranties therein contained, it was held, that the sentence of condemnation by a foreign court of Admiralty is not conclusive evidence, that the ship was not neutral; unless it appear that the condemnation went upon that ground: consequently the underwriter remains liable. A sentence of a court of Admiralty binds all the world, as to every thing contained within it; but where the cause of condemnation does not appear to be on the specific ground material to the point in issue, evidence must be admitted in order to explain it.

*Fernard v.
Motteux,
Doug. 575.*

Insurance of freight and goods was made upon the ship the *Jane* (or *Juanna*) at and from *Venice* to *London*, "warranted neutral ship and neutral property." The cause was tried before Lord Mansfield, at Guildhall, when a verdict was found for the plaintiff, subject to the opinion of the court, upon a case which stated as follows: That the defendant underwrote the policy; that the ship was taken by a *French* frigate, called *La Magicienne*, as she was sailing from *Venice* on her voyage to *London*; that the plaintiff offered to give evidence on the trial, that the property of the ship and the property of the cargo were *neutral*; and that the papers belonging to the ship fell overboard by accident, after she was brought to by the *French* frigate: but the defendant objected to such evidence being received; and he produced as the ground of his objection the sentence of the condemnation of the ship in the *French* Admiralty Court, which was read, and is as follows:

*Almeria,
"The Joana-
"na."*

"*Louis Jean Marie de Bourbon, Duke of Penthièvre, Admiral of France.* Seen by us, the *procès verbal*, made on board the snow *Joanna*, taken by the king's frigate *La Magicienne*, commanded by M. *De Boades*, dated the 2d of *December* last. Signed *Saint Owey*, Steward, *Bouret*, *Dominico Zané*. Seen by the captain commander. Signed *Boades*;—purporting that the said 2d of *December* last, at five o'clock in the evening, his said majesty's frigate, *La Magicienne*, commanded by the said captain *De Boades*, being ten leagues east of *Cape de Moulines*, having discovered a snow steering south-south-west, the wind south-west, and having come up with her, and stopt her, under *Venetian* colours, after an hour's chase, the said M. *De Boades*

“ *Boades* ordered the captain to bring on board his muster roll, C H A P.
 “ passport, and bills of loading; with which order the captain XVIII.
 “ did not readily comply, under a pretence that the sea was
 “ rough, and that his long-boat was leaky; but, being at last
 “ obliged to comply, upon threats being made of firing on him,
 “ and being come on board, he declared, *that, in getting up the*
 “ *ship's side, the box containing his muster-roll, his patents, and*
 “ *passport, had fallen from his pocket into the sea, and only shewed*
 “ his bills of loading; by which they found the said snow, the
 “ *Joanna*, of 14 men, including officers, commanded by *Domi-*
 “ *nico Zané of Venice, sailed from Venice the 25th of September,*
 “ *with a cargo of 12 bales of silk, dried raisins, oil, &c. and*
 “ other effects mentioned in the bills of loading by him exhi-
 “ bited, for the account of sundry persons in *Venice*, consigned to
 “ sundry persons in *London*, whither he was bound. These goods
 “ going into an enemy's country, and the loss of his papers, which
 “ had fallen into the sea, raising suspicions; the said snow had been
 “ stopped, and carried by his majesty's frigate, *La Magicienne*,
 “ to *Almeria*, where she had been put into the hands of the
 “ consul, after the said *Saint Owey*, lieutenant, acting as steward,
 “ and the said *Bouret*, ensign on board the said frigate, had put
 “ their seal on the said snow, where they found no papers; and
 “ taken on board the said ship ten of the said snow's crew, which
 “ were replaced by six men from on board the *Magicienne*, and
 “ three from the *Atalante*, with a coasting pilot, who have
 “ brought the said snow into the port of *Almeria*. The premises
 “ considered, We, by virtue of the power delegated to us as
 “ aforesaid, have declared, and declare, as good prize, the ship
 “ the *Joanna*, her tackle, and apparel, together with the goods
 “ of her cargo, and do adjudge them to the captors; that, in
 “ consequence of this decree, the whole be sold (if not already
 “ done) in the usual manner, and the produce divided according
 “ to the desire and ordinance of the king; made the 28th of
 “ *March 1778*. We order, by these presents, the vice consul
 “ of *France*, at *Almeria*, to look to the execution of this our
 “ ordinance; and hereby authorize and command the first tip-
 “ staff, or serjeant, to proceed in all forms requisite thereto.
 “ Done at *Paris* the 13th of *January 1779*, *Rigot*.” The
 question stated for the opinion of the court was, Whether the said
 sentence was not conclusive evidence against the plaintiff's re-
 covering in this action? In the course of the arguments, the
 third.

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third article of the regulations of the marine of *France*, bearing date the 26th of *July* 1778, and also the *procès verbal*, made at the time of the capture, though not stated in the case, nor given in evidence at the trial, were so much referred to, and seemed of such weight to the court, that it will be necessary to insert them in this place. *Arret for the regulation of the marine, &c.* 26th *July* 1778. Art. 3. "All vessels taken, of what nation soever, either neutral or allied, from which it is known that any papers have been thrown into the sea, suppressed or abstracted, shall be declared good prize; together with their cargoes, upon the mere proof, that some papers have been thrown into the sea, without any necessity of examining what those papers were; by whom they were thrown; and even though a sufficient quantity should remain on board to justify that the ship and the cargo belonged to friends or allies." The *procès verbal* need not be here repeated; for although it is not substantively set out in the case, yet it is copied almost *verbatim* in the sentence of the *French* Admiralty. It was admitted at the bar, that the sentence had been appealed from, and had been affirmed; but nothing new or special appeared in the proceedings on the appeal. This case was twice argued at the bar; and after the second argument, the Court desired that it might stand over, in order to give time to apply to the defendant for his consent; that the above *arret* and the *procès verbal* should be added to the case. To this proposition the defendant would not consent.

Lord *Mansfield*, upon the first argument said:—"The first principles are clear and admitted. All the world are parties to a sentence of a court of Admiralty. Here there is a monition published at the Exchange; and in other countries, at some place of general resort; and any person interested may come in and appeal at any time, if there has been no *laches*. If there has, the time of appeal is limited. But the sentence, as to that which is within it, is conclusive against all persons, unless reversed by the regular court of appeal. It cannot be controverted collaterally, in a civil suit. The difficulty here is, what the ground was, on which the *French* Admiralty went; whether the ground of enemy's property, or that of the papers having been thrown overboard. By the maritime laws of all countries, throwing papers overboard is considered as a strong presumption of enemy's property; and upon that principle the *arret* of 1778

is founded. But in all my experience in *England*, I have never known a condemnation on that circumstance only. It is made use of as a strong ground of suspicion. The *arret* is very rigid. It is difficult to find out what the ground of this sentence was. I incline to think the Court went upon the ground of *enemy's property*, and considered the want of the papers as a strong presumption of that fact; but they did not examine the captain upon interrogatories, as to the contents of the papers; and, upon the whole, enough does not appear on this obscure sentence, to ascertain precisely on what it was founded, and some other method ought to be taken to enquire what the ground of it was. As to whatever it *meant* to decide, we must take it to be conclusive."

Willes and *Ashurst*, Justices, concurred with his Lordship.

Mr. Justice *Buller* inclined to doubt, and said:—"To be sure, the sentence was obscure, but, taking it altogether, he did not think there was much difficulty in discovering the grounds of it. The two circumstances, of the cargo being consigned to the enemy, and the falling of the papers into the sea, are stated as the grounds of suspicion. The latter circumstance,—papers falling into the sea,—could not be a ground of condemnation. The other could raise no other suspicion, nor a presumption of any thing else, but the property being enemy's property. It follows therefore, that the condemnation went upon that ground. If it had gone upon a *wilful throwing of papers overboard*, that would have been stated substantively as the ground. In the first place, lay the *arret* out of the case; and then wilful throwing papers overboard is only presumptive evidence of enemy's property. Then take the *arret*, still wilful throwing overboard might have been used as evidence of enemy's property, or it might have been a substantive ground under the *arret*: here it is not stated as a substantive ground."

Lord *Mansfield*, after the second argument, said; that if the *procès verbal* should be agreed to be made part of the case, it would clearly explain the ambiguity of the sentence; as it set forth the ground for taking the ship to have been the *arret* of July 1778. Without the *procès verbal*, he said, the sentence was equivocal; it took all in; and it was difficult to say what it went on. If the papers produced to the captor were fair, the pro-

C H A P. property was neutral. But the *procès verbal* put the ground of
 XVIII. the sentence out of all doubt.

Mr. Justice *Buller* also declared, that he thought the *procès verbal* must be taken as part of the proceedings, and, as that expressly referred to the *arret*, as the ground of the capture, and the sentence was consistent with it, the sentence must be taken to be founded on the *arret*. But he adhered to his former opinion, on the case as stated without the *procès verbal*, namely, that the interpretation of the sentence, taken by itself, must be, that the condemnation went on the ground of enemy's property, and was, therefore, conclusive against the plaintiff.

The final refusal of the defendant was signified by Mr. *Lee*, who assigned as a reason for it, that the *procès verbal* was not a proceeding in the *French* court of Admiralty, but merely an account of what passed on the capture, reduced into writing, at the time. He also observed, that, in the sentence, all the *procès verbal*, except the concluding part, which refers to the *arret* of July 1778, was recited, and this afforded a strong argument for inferring, that the Court had purposely omitted that part of it, to shew that they did not condemn the ship on the ground of the *arret*.

Lord *Mansfield* disapproved much of the defendant's refusal, but he said, he thought the justice of the case might still be got at, on the ground of the ambiguity of the sentence, which did not mention a word about the property being enemy's property; that it was clear the *French* Admiralty meant to proceed on the ground of throwing the papers overboard: and he agreed with the counsel for the plaintiff, that the *procès verbal* ought to be considered as part of the proceedings, and that the sentence ought not to have been read without it.

Mr. Justice *Buller* thought there was weight in what had been observed by Mr. *Lee*, on the reason for omitting the concluding part of the *procès verbal* in the sentence. Indeed, it was not clear that what was now offered to be produced, was the same *procès verbal* which the sentence recites; and if it could be supposed that the captain had made another, omitting the reference to the *arret* as the ground of the capture, that could only be accounted for

for, by his having found that the capture could not be supported on that ground. CHAP.
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Mr. Justice *Willes* thought it most manifest, that the *præter verbal* made at the time of the capture was that on which the sentence proceeded. The sentence began with mentioning it, and recited it exactly, as to date, and every thing else, as far as it went. The word *purporting* did not require a recital of the whole; and it was not necessary for the Admiralty Court to set forth the captain's reasons for detaining the ship. He had all along been of opinion, that the sentence was so ambiguous, that it did not appear that the cause of condemnation was that the property was neutral, and therefore had thought evidence necessary to explain it.

Mr. Justice *Asbhurst* concurred, as to the ambiguity of the sentence, and that it was, therefore, not conclusive; and on that ground, Lord *Mansfield*, and *Willes* and *Asbhurst*, Justices, declared their opinion that the *posse* ought to be delivered to the plaintiff. *Lee* still urged the danger of opening the sentences of foreign courts of Admiralty, which are generally informal; upon which Lord *Mansfield* said, all the supposed inconvenience would be obviated, if the foreign courts would say in their sentences, "Condemned as enemy's property."

In the case just reported, it is admitted by all the judges, that a sentence of a Court of Admiralty abroad is binding upon all parties, as to what appears upon the face of it. And therefore if it appear evident, without a possibility of doubt or ambiguity, that the sentence proceeded upon the ground of the property not being neutral, that is conclusive evidence against the insured, that he has not complied with his warranty; and consequently the underwriter is no longer responsible. This was fully settled in the case of *Barzillay v. Lewis*.

Baring v. Cleggett,
3 Bos. & Pull. 201.
and *Baring v. Christie*,
5 East's Rep.
398. Ass.

It was an action on a policy of insurance on a ship from *Liverpool* to *Amsterdam*, warranted *Dutch property*; and it was brought to recover for a total loss, the ship having been captured by the *French*, and condemned by the court of Admiralty there. The plaintiff (the insured) was nonsuited in this action, from an idea, that the decree of the parliament of *Paris* was decisive against him, that he had not complied with his warranty. Upon a motion to set aside this nonsuit, the following facts

Barzillay v. Lewis, B.R.
Trin. Term,
22 Geo. III.

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facts appeared from the report of the judge who tried the cause! The ship in question was originally a *French* privateer, called *L'Aimable Agathée*, which was taken by an *English* privateer, and carried into *Liverpool*, condemned in *England*, and she then got the name of *The Three Graces*. A merchant at *Liverpool* afterwards bought her for a house at *Amsterdam*, and a passport was sent for her from thence. She was then insured by a *Dutch* name, and warranted as in the policy; she went to sea, was captured by a *French* ship, and carried into *St. Maloes*, where she was released by the Vice Admiralty Court as being *Dutch*. But upon an appeal to the parliament of *Paris*, the sentence was reversed, and she was condemned as lawful prize, by the name of *The Three Graces of Liverpool*. It appeared in evidence, that there were certain *French* ordinances, which ordain, that where more than one third of the crew of a neutral ship are enemies to the king of *France*, the ship shall be confiscated: that no ship shall be considered as transferred, till she has been within the port of the purchaser; and that a passport shall be deemed fraudulent, unless the ship has been in the port from whence it has been obtained. The ship's crew in question consisted of sixteen; five of whom were *French*, four were *Danes*, two were *Sweders*, one was *Dutch*, one *Portuguese*, one *Hamburgher*, one *Norwegian*, and one *Irishman*. Some of the crew swore, that they were hired by *Englishmen*, and that both the ship and the cargo were *English*. They also swore, that when the ship which took them came in sight, the captain sailed back towards the *English* coast: but one of the crew having informed him, that the ship in sight carried *English* colours, he resumed his course.

Lord Mansfield.—“The sentence of the Court of Appeal in *France* is conclusive. The question is, What that sentence means? She is condemned as not being a *Dutch* ship. The warranty is, that she is *Dutch*, which is false. The law of nations is founded on eternal principles of justice; and in every war the belligerent powers make particular regulations for themselves. But no nation is obliged to be bound by them, unless they are agreeable to the general laws of nations; but all third persons and mercantile people are bound to take notice of them for their own safety. In this case, the plaintiffs warrant this ship to be *Dutch*; and they must see that she is in such a state as to be entitled

titled to all privileges of neutral property. The insurers took the risk upon this warranty; she was insured by her *Dutch* name, and the underwriters take it for granted that she is so: but when the matter is sifted in *France*, she appears to have none of the requisites to shew she was neutral property, for she had never been in a *Dutch* port, and the sea-brief or passport was not conformable to the treaty of *Utrecht*. The parliament of *Paris* did not condemn her as the *Dutch* ship of *Amsterdam* by her *Dutch* name; but as "*The Three Graces of Liverpool*." Indeed she had none of the requisites of a *Dutch* ship; and the regulations require that she should have been into the port of the purchaser, in order to transfer the property; the knowledge of all which circumstances the insured, by his warranty, took upon himself. I am therefore of opinion, that the warranty was false."

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Mr. Justice *Willes*, and Mr. Justice *Asphurst* concurred.

Mr. Justice *Buller*.—"The first sentence seems to have gone on particular *arrêts*. The second appears to go on the ground of property, for the name is changed, and they do not go into evidence as to the muster-roll or situation of the crew, as to there being more than two-thirds *English*. The other ground is more general, and makes it immaterial whether it was on the one ground or the other; for if she were not so documented as to have the protection of a neutral ship, the warranty has not been complied with." The rule to set aside the nonsuit was accordingly discharged (a).

It has also been determined, that where no special ground at all is stated; but the ship is condemned generally as good and lawful prize, the Court here must consider it as conclusive evidence that the property was not neutral, and will not again open the proceedings of the court abroad in favour of the party, who has warranted his property to be neutral.

An action was brought upon a policy of insurance on goods warranted neutral on board the *Thetis*, a *Tuscan* ship, to recover

Salouet v. Woodmass,
B. R. Hil.
24 Geo. III.

(a) In the four first editions a *nisi prius* case of *De Souza v. Ewer* occupied the whole of page 361, but the very learned person who decided that case, having since declared from the Bench, with that candour which always attends great talents, that that decision could not be supported, it is here wholly omitted. See 8 Term R. 444, note (a).

the

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the amount of the insurance from the underwriters. The ship had been taken in the course of her voyage by a *Spanish* vessel, carried into *Spain*, and her cargo was there condemned "*as good and lawful prize*." There was an appeal to a superior court, which reversed the sentence: but upon a further appeal, the latter decision was overturned, and the former confirmed. At the trial of this cause before Lord *Mansfield*, his Lordship being of opinion that the sentence of the *Spanish* Court of Admiralty was conclusive evidence of the falsehood of the plaintiff's warranty, the plaintiff was nonsuited. A motion was made, and fully argued to set aside the nonsuit, which was unanimously refused by the whole Court of King's Bench.

Lord *Mansfield*.—"The policy here warrants that this cargo was neutral property. It appears from the policy itself, that the ship was neutral, because it is called a *Tycoon* ship; but the warranty is that the goods are neutral. It must be presumed from the condemnation, as no other cause appears, that it proceeded on the ground of the property belonging to an enemy. In the case of *Bernardi v. Motteux*, the decision of the court turned upon the particular ground of the confiscation appearing on the face of the sentence; and that it did not appear to be on the ground of being enemy's property. This being so, the court gave the party an opportunity to shew by evidence, that the specific ground was really the cause of condemnation. In this case, at *Guildhall*, the counsel admitted the general rule; but they said, if a copy of the proceedings could be had, a special cause would appear. The proceedings are now come; and from them it appears, that the question turned entirely upon the property of the goods. For in the second court, to which they appealed from the sentence of the first, the question was, Whether the goods were free? the decree was, that they were. But the third court overturned the decision of the second. It is sufficient, however, that no special ground is stated; and therefore the rule must be discharged."

Geyer v.
Aguilar,
7 Term Rep.
681.

If a foreign Court of Admiralty condemns a ship (warranted *American*) as enemy's property, for not having on board a *role d'équipage* or list of the crew, which is required by a *French* ordinance to be on board the ship, and which the Court of Admiralty adjudged to be requisite within the meaning and construction of the treaty

treaty between the two countries of *France* and *America*, the Court of King's Bench held that the adjudication in *France* was conclusive against the warranty, that she was an *American* ship, though in fact she was so; that point being clearly within the jurisdiction of the foreign Court(a).

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'But where there is *no warranty* of being *American*, a sentence adjudging a ship to be good prize, *as belonging to the enemies of the republic*, negatives no fact, which it was incumbent on the assured, having made no warranty, to establish; for the *English* courts are only bound by the decretory, or concluding part of the sentence, and, where the adjudication is on the ground of enemy's property, are not bound to examine the premises that led to the conclusion. If, indeed, there had been a warranty, the adjudication that it was enemy's property would have been conclusive against such a warranty.

Christie v.
Secretary,
8 Term
Rep. 192.

Goods were insured on board the *Hermon*, without any addition of country or place, and not represented to be of any particular country at the time of subscribing the policy, although the broker, when the ship was subscribed, had said, she was an *American*; it was held that, though she was, in fact, an *American*, she need not, under these circumstances, be documented as such to entitle the assured to recover against the underwriters, for a loss by capture, and subsequent condemnation, for want of the documents required by treaty between her own and the capturing state; for she was neither insured as *American*, nor represented to be such at the time when the policy was effected.

Dawson v.
Atty, 7
East's Rep.
367.

If the ground of decision appear to be not on the want of neutrality, but upon a foreign ordinance, manifestly unjust, and contrary to the laws of nations, and the insured has only infringed such a partial law; as the condemnation did not proceed on the point of neutrality, it cannot apply to the warranty, so as to discharge the insurer.

(a) Even where there has been no sentence of condemnation, if a ship is warranted *American*, and sails without such a passport, as is required by the treaty between *France* and *America*, the warranty is not complied with, and the underwriters are discharged; even though the ship suffers no inconvenience from the want of it. Such a warranty does not mean merely that the ship is *American* property, but that she is entitled to all the privileges of an *American* flag.

Rich v.
Parker,
7 Term
Rep. 703.

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Mayne v.
Walter,
B. R. East.
2d Geo. III.

In a policy of insurance, the ship was warranted to be Portuguese; and having been taken in her voyage by a French privateer, she was carried into France. The Court of Admiralty condemned her because she had an English supercargo on board. It appeared that there was a French ordinance, prohibiting any Dutch ship from carrying a supercargo belonging to any nation at enmity with the court of France. In an action against the underwriter, these facts appeared; upon which, a verdict was found for the plaintiff, subject to the opinion of the Court, upon this question, Whether the circumstance of having an English supercargo was a breach of neutrality; and whether such a sentence was conclusive?

Lord Mansfield.—“It is an arbitrary and oppressive regulation, contrary to the law of nations, and there is no proof that the plaintiff knew any thing of it. If you were both ignorant of it, the underwriter must run all risks; and if the defendant knew of the edict, it was his duty to enquire, if there was such a supercargo on board. It must be a fraudulent concealment to vitiate a policy. But it is remarkable that neither party has said any thing of the treaties between France and Portugal; neither party seems to know any thing about them, and yet the whole case turns upon them.” Judgment for the plaintiff (a).

The case just reported has undergone a variety of discussion in Westminster-hall, and has lately received most ample confirmation in two or three cases, which shall be mentioned in their order; and by which the principle seems fully established, that if the sentence of the Court of Admiralty has not decided the question of property, and has not declared, whether it be neutral or not, the insured, who has warranted his property to be neutral, shall not be precluded from recovering against the underwriters, although the foreign Court of Admiralty has condemned the property as prize, for having violated some of their ordinances.

Pollard v.
Bell,
8 Term.
Rep. 434.

The first of these cases was an insurance on goods on board the ship *Juliana*, “warranted a Dane,” on a voyage from London to Teneriffe, with liberty to touch at Guernsey and Madeira,

Siskin v.
Lee, 2
New R.
484.

(a) So if a ship be restored, but damages and costs denied to the claimants, because they had not fully complied, as to their documents, with certain French ordinances the assured may recover for the detention notwithstanding.

for account of persons resident at *Teneriffe*; and the loss was declared to be by capture. At the trial, a verdict was found for the plaintiff, subject to the opinion of the Court upon a case, which stated, that the ship was a *Danish ship*, and the property of *Danish subjects*, and previous to the voyage insured, had a passport signed by the king of *Denmark*, for a voyage from *Copenhagen* to ports in the *East Indies*. *Eggleston*, the captain of the ship, sailed from *Copenhagen* on the 23d June 1796, having on board a cargo of tar, pitch, &c. and arrived in the *Thames*, according to verbal orders from his owners, 23d July 1796. During his stay he took on board goods for the owners, besides those in question, and having taken out clearances for *Madeira* and *Guernsey*, sailed, arrived at the latter place, and after sailing from thence, was captured by a *French* privateer, and carried into *Bordeaux*. At the time of the capture, and during the whole voyage, the *Juliana* had on board the passport and every other document usually carried by *Danish ships*. She had also a role d'*equipage*, containing the names and places of nativity of the officers, but not of the crew, only stating the latter generally to be sixty men of colour. Captain *Eggleston* was born in *Scotland*, of *British* parents. He was not naturalized in *Denmark*; but on the 6th of *October* 1794, posterior to the war between *England* and *France*, he obtained letters of burghership in *Denmark*, but had no domicile, never having resided there.

Proceedings were instituted at *Bordeaux*, before the Tribunal of Commerce, which condemned the ship and cargo, except one bale, belonging to the captain, as prize. From this sentence Captain *Eggleston* appealed to the Civil Tribunal of *La Gironde*, where there was a general sentence of condemnation. These sentences referred to several *French* ordinances, particularly the one alluded to in *Mayne v. Walter*, of 1778; by which it is declared, that all ships shall be confiscated "wherever there shall be found on board a supercargo, merchant, commissary, or chief officer, being an enemy." It is not necessary to state these sentences, because the Court of King's Bench were of opinion, that the effect of those sentences, and particularly of the ultimate sentence now to be mentioned, was to condemn, not on the ground that the property was not neutral, but because the circumstance of the captain's being a *Scotchman*, was a violation of this ordinance. From the two former sentences, the captain

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appealed to the Supreme Tribunal of Cassation at *Paris*, which decreed as follows: "Having heard the parties, the Tribunal considering that it has been fully proved, by the confession of Captain *Eggleston*, and ascertained by the judges of *La Gironde* that the said Captain *Eggleston* was born in Scotland, and an enemy; that his denization in a neutral country was not justified according to law; that his quality of enemy sufficed to legitimate the prize; that the fact of captain *Eggleston* being a Scot and an enemy, existed independently of the papers on board; that in consequence all remedies of nullity drawn either from the withdrawing of some of the papers on board, or from the non-application of the seal to the bag wherein they were inclosed, cannot give any ground to cassation; rejects the request of Captain *Eggleston*, and condemns him to the fine of 150 francs." After this case was twice argued,

Lord *Kenyon* C. J. said—"This is an action on a policy of insurance on goods on board a ship warranted to be a *Danish* ship: a loss having happened, the defendant resists the plaintiff's claim, because (he says) the ship in question was not, what she was warranted to be, *Danish*: and I agree with the defendant, that the meaning of the warranty was, not merely that the ship was *Danish* built, but that she ought to be so circumstanced, during the voyage, as a *Danish* ship ought to be. This does not appear to me to be a case of difficulty though it is of great importance to the public. This is one of the numberless questions that have arisen in consequence of the extraordinary sentences of condemnation passed by the Courts of Admiralty in *France* during the war. I do not think they were characterized too strongly at the bar, when it was stated they all proceeded on a system of plunder: but still until the legislature interferes on this subject, we sitting in a court of law are bound to give credit to the sentences of a competent jurisdiction. If therefore in this instance the French Courts had condemned this ship on the ground that it was not *Danish* property, we should have been concluded by that sentence in this action, and must (however reluctantly, it being stated as a fact in the beginning of the case, that it was a *Danish* ship,) have given judgment for the defendant. This is proved by the different cases cited in the argument, with the decisions in which I concur, and it is supported by reason. To a question asked in the
court

course of the argument, What are the rules by which Courts of Admiralty profess to proceed? I answer, the law of nations, and such treaties as particular states have agreed should be engrafted on that law. It was said, however, by the defendant's counsel, that an *arrêt* has the same force as a treaty: but, without stopping to enlarge on the difference between them, it is sufficient to say, one is a contract made by the contracting parties, and the other is an *ex parte* ordinance made by one nation only, to which no other is a party; and I concur with Lord Mansfield in opinion, that it is not competent to one nation to add to the law of nations by its own arbitrary ordinances, without the concurrence of other nations. That is the ground, on which this case must be decided. Now let us see what was the foundation of the condemnation in the *French* courts? It is stated in one of the sentences, that, by their own ordinances, all ships are to be confiscated, "whensoever on board these ships shall be found a "supercargo, merchant, commissary, or *chief officer, being an enemy.*" But I say, they had no right in making such an ordinance to bind other nations. *Then was the ship in question condemned on the ground that she was not Danish property?* Certainly not. A vast variety of circumstances wholly irrelevant, are set forth in the sentences: but it appears, beyond all doubt, that *the ship was at last condemned on the ground that the captain was one of those persons whom by their own ordinance only, they wished to proscribe.* This case cannot be distinguished from that of *Mayne v. Walter*; though even without the authority of that case I should have had no hesitation in deciding in favour of the plaintiff. *On the whole, therefore, I am of opinion, that though, if contrary to justice, the ship had been condemned simply because she was not a Danish ship, we should have been concluded by that sentence, yet as the Courts abroad have endeavoured to give other supports to their judgments which do not warrant it, and have stated as the foundation of the sentence of condemnation, one of their own ordinances, which is not binding on other nations, this sentence does not prove that the ship in question was not a neutral ship; and consequently the plaintiff is entitled to recover."*

Grose J.—"This is an action brought on a policy of insurance to recover the amount of a loss stated in the declaration. The plaintiff proved his interest, and the loss, and *prima facie* proved that the ship was *Danish*. The defence to the action is, first, that

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that though it is stated the ship was *Danish*, she was in truth the property of an enemy, and therefore not neutral; and secondly, that she had not documents on board to prove that she was neutral. With regard to the first, it is not only not stated as a fact, nor to be collected by inference that she was not a neutral ship, but it is *expressly stated as a fact* in the former part of the case, that *the ship was a Danish ship* and the property of *Danish* subjects. If this had been found as a fact on a special verdict, it would have been conclusive, and we could not have inferred the contrary from the sentence; but referring to the sentence, it comes to this, that it there appears that the ship was a *Danish* ship, unless the circumstance of the captain's having been born in *Scotland* is evidence to shew that it was not a *Danish* ship: but I find nothing to warrant that either in our own law or in the law of nations. In the case of *Mayne v. Walter*, the Court of Admiralty in *France* condemned the ship, because she had an *English* supercargo on board, which was contrary to one of the *French* ordinances: but this Court did not consider, that the circumstance of a neutral ship having on board an *English* supercargo was a breach of neutrality. So here this ship having on board a native of *Scotland* is no proof that the ship in question was not neutral. As to the second question, if the ship had been condemned for not having the proper documents on board, we must have decided for the defendants. But it appears by the case, that in point of fact she had "every document usually carried by "*Danish* ships." I admit that if the ship had been condemned generally as a lawful prize, our law would have considered that as a denial of her neutrality; or if the ground of the sentence of condemnation had been that the ship was not neutral, that also would have been conclusive in this action. But by referring to the last sentence which I consider as the sentence of *dernier resort*, it evidently appears, that she was condemned because the captain was born in *Scotland*, and an enemy. My opinion then on the whole is, that as the ground of the sentence of condemnation was an infringement of an ordinance of one state, it does not appear by that sentence that the ship was not, what the jury found her to be, a *Danish* ship, or that she was condemned for having, by an act contrary to the law of nations forfeited her neutrality."

Lawrence J.—"The question is, Whether the sentence has negatived the warranty of neutrality? The warranty of neutrality
does

does not induce any necessity to comply with the peculiar regulations of the belligerent powers. For if a ship be captured, and the question be, whether she be neutral or not, the general rule for judging and deciding on that point is the law of nations, subject to such alterations and modifications, as may have been introduced by treaties : but where the law of nations has not been varied or departed from by mutual agreement, that is the general rule for deciding all questions on matter of prize. This is clearly laid down in a state paper signed by Sir *George Lee*, Dr. *Paul* the King's Advocate, and Sir *D. Ryder* and Mr. *Murray* then Attorney and Solicitor General, in answer to the *Prussian* memorial concerning neutral ships (a). When therefore a state in amity with a belligerent power has by treaty agreed that the ships of their subjects shall only have the character when furnished with certain precise documents, whoever warrants a ship, as the property of such subject, should provide himself with those evidences, which have by the country to which it belongs been agreed to be the necessary proof of that character. In requiring this, no difficulty is imposed, of which the assured is not aware, and which may not be in his power to prevent : but to require of him to furnish himself with every document the belligerent powers may require, and to insist that the warranty is not complied with, unless the ship be navigated according to their ordinances and regulations, would be to deprive the assured of his indemnity for the want of papers, &c., of the necessity of which he may fairly be presumed ignorant, and which papers it may not be in his power to procure : for how can the officers of one country be called on to grant that, which the laws of their own country do not require ? These French decrees are regulations made with some view to the laws of France, but are not applicable to the subjects of any other country. In examining the cases decided on this point, it will not be found that there is any determination of the court to support what has been insisted on by the defendant : but on the contrary it has been settled in many cases, *that a condemnation on the particular ordinances of a belligerent power is no violation of a warranty of neutrality.* In the case of *Bernardi v. Motteux* the ship *Joanna* was warranted neutral ; the only doubt was, whether the ship were condemned as being the

Supra, 464.

(a) Vide *Collectanea Juridica*, 1 vol. 33. and 2d *Pothlethwaite's Dictionary*, 715. article *Sikfa*.

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property of an enemy, or for violating a *French arrêt* by throwing papers overboard ; for the one or the other of those causes she was condemned. If she were condemned for the first, namely, that *she was not neutral*, the plaintiff clearly could not have recovered : nor could he have recovered if she were condemned on the other ground, according to the argument of the defendant in this case : but it is clear, that the court did not, in that case, adopt the defendant's argument here, because the plaintiff did recover in that case, it not being certain that the ground of condemnation was, that the ship was the property of an enemy. [The learned Judge here also commented on the case of *Barzillay v. Lewis*, *supra*, 469. and on *Salucci v. Johnson*, *post.* and *Mayne v. Walter*, *supra*, 474. a. and then proceeded.] The argument of the defendant here is, that the sentence of condemnation is conclusive on the point that the ship was not navigated according to the contract between the parties : *the contract between the parties is that she was a neutral ship, but the sentence has not decided that point ; it has only decided that she was not navigated according to the ordinances of France, but that was no part of the plaintiff's contract.* In deciding this case, in favour of the plaintiff, we do not take upon ourselves to say that the sentence of the *French court of admiralty* is erroneous : all that we determine is, that *the French court has not decided that, which would be a breach of the warranty of neutrality.* On the whole I think it clear that the ship in question was condemned for acting in contravention of *French ordinances*, and that does not falsify the warranty of neutrality."

Le Blanc J.—" On examining the sentences in the different courts of *France*, we cannot collect, that the ship was ultimately condemned because she was not a *Danish ship*. As the grounds of condemnation are stated in the sentences themselves, unless we can collect that the ship was condemned as prize, because she was not a *Danish ship*, those sentences are not conclusive on this question between the litigating parties. The question in this case is, Whether or not the ship were *Danish* ? in looking through these sentences of condemnation, I do not find that she was condemned as not being *Danish*, or for not having those documents, that the law of nations or particular treaties between the respective countries require to evidence her to be a *Danish or neutral ship*. The sentences in *France*, whether right or wrong, are conclusive on the question of prize ; and there-

therefore if the question here had been, Whether or not the ship had been captured as prize, those sentences would have been conclusive. But that is not the question here; the only question here being, Whether or not this were a neutral ship at the time of the capture? I admit, that in order to comply with the warranty of neutrality it was necessary, not only that the ship should be a neutral ship, but also that she should be properly documented, and should be navigated in such a manner as to be entitled to the benefits of neutral ships. But here the ship was condemned for non-compliance with the ordinances of one belligerent power, to which it does not appear that *Denmark* ever consented. Then the question is, Whether a sentence, appearing on the face of it to have been given on that ground, ought to preclude the plaintiff from shewing, that in point of fact the ship was a *Danish* ship? *As it does not appear on the sentence that the ship was condemned as not being a Danish ship, I think it is competent for the parties to go into the proof of that fact.* Without repeating the authorities that have been referred to in support of our opinion, I think that the conclusion from them all is this; that the sentence of a foreign court is conclusive on that point which it professes to decide; if it be a general sentence of condemnation, without assigning any reason, the courts here will consider that it proceeded on the grounds of the ship being the property of an enemy; but if the sentence itself professes to be made on particular grounds, and they are set forth in the sentence, and appear not to warrant the condemnation, then the sentence is not conclusive as to those facts. Therefore as the sentences of condemnation in this case profess to be made on an ordinance of *France*, to which *Denmark* is no party, they do not falsify the warranty of neutrality as between the parties to this cause, though they may justify the courts abroad in condemning the ship as prize. If the question here had been, whether or not the ship had been prize; the sentences abroad would have been conclusive: but the question here being only, whether or not the ship were neutral; those sentences are not conclusive on that point." Judgment was given for the plaintiff.

I have given the opinions of the learned judges nearly at length; because it was a case maturely and fully considered by them; and because the distinctions there taken support the former decisions of Lord *Mansfield* and the judges, who composed
the

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the court in his time ; and because the same distinctions appear to me to support and maintain all the subsequent decisions.

Bird v.
Appleton,
8 Term Rep.
562 See
ante, c. 12

The next case upon this subject, and which has already been mentioned for another point in a former chapter, was an insurance on the ship *Confederacy*, an *American ship*, at and from Canton in China to *Hamburgh* or *Copenhagen* : and at the trial a special verdict was found, the facts of which, as far as this point requires the statement of them, were, " that the ship *Confederacy* was an *American-built ship*, the property of *American subjects* ; that the ship sailed from Canton towards *Hamburgh* with the goods on board in *January 1797*, having on board a passport duly made out and granted according to the form annexed to the Treaty of Commerce between *France* and *America*, and during her voyage was captured by a *French ship* of war, and carried into *Nantz* ; where proceedings being instituted before the tribunal for determining questions of prize, the ship and cargo were condemned as prize." The sentence began with the following considerations : " Considering that although it appears " by reading and examining the documents, and by the declaration of the captain, supercargo, and the greatest part of the " crew, that the ship *Confederacy* has not ceased to be neutral property, and belonging to neutral citizens and subjects of the United " States of *America* : considering that although by the same " documents and declarations, it is equally evident and proved, " that the goods shipped were laden by neutral citizens for account " of neutral citizens : considering that, notwithstanding these " favourable presumptions, nothing can exonerate the captain " and supercargo from having regular dispatches, in order to prove " the neutrality of the ship. The sentence then proceeds to recite certain *French* ordinances, which declare to be good prize all neutral vessels not having on board a list of the crew attested by the public officers of the neutral places. It then says, " considering that so far from derogating from the general regulations " for all nations in favour of the *Anglo-Americans* by the treaty " of *February 1778*, it implicitly subjects them to it by the 25th " and 27th articles, which oblige them to conform to the model " of the passport annexed to the treaty." It also states a law of the Convention, and another of the Executive Directory of the 12th *Ventose* of the 5th year, which latter recites the ordinances of 1744 and 1778, and declares, that all *American* vessels shall

shall in consequence be good prize, which shall not have on board a list of the crew in due form, such as is prescribed by the model annexed to the treaty between *France* and *America* of 1778. The sentence then concludes thus: "The Tribunal, in conformity to the above-mentioned laws and regulations, and particularly the decree of the Executive Directory of the 12th *Ventose*, 5th year, adjudges and declares the validity of the prize of the foreign ship the *Confederacy*, and all the goods and effects composing the lading or cargo of the ship, in default of the captain and supercargo being regular in their list of crew and dispatches." The special verdict also found that ships belonging to *America* never did at any time prior to the capture in question carry with them lists of their crew attested in the manner required by the ordinances referred to; and that *America* has always insisted, and still insists, that her ships are not, by treaty or otherwise, bound or obliged so to do.

This special verdict was argued several times upon the various points that arose upon it; and the judges afterwards delivered their opinions unanimously, as to this point, in favour of the assured, namely, that the *French* sentence did not decide that the ship was not neutral.

Lord *Kenyon* said—"After the greatest attention I have been able to bestow on the subject, I adhere to the opinion that we gave in the case of *Pollard v. Bell*, and that decision is directly in point to the present case." His lordship then adverted to particular parts of the sentence, which it is unnecessary here to consider; but concluded that it was manifest from an attentive consideration of the whole sentence, that the single ground, on which it proceeded, was that mentioned in the concluding part of the sentence, namely, "in default of the captain and supercargo being regular in their list of crew and their dispatches." Now that is neither required by the law of nations, or by the treaty between *France* and the United States of *America*, and it is found by the verdict that all the requisites of that treaty were complied with.

Mr. Justice *Grose* concurred.

Mr. Justice *Lawrence*.—"The only remaining question is, Whether or not it were decided by the foreign sentence that the ship was

C H A P. XVIII. *was an American?* It was determined in the case of *Pollard v. Bell*, that a sentence of condemnation for violating the ordinances of one nation, not adopted by the treaty between that nation and the country, of which the owner of the property is a subject, will not prevent the assured recovering on the policy, on the ground that such sentence negatives the warranty of neutrality. But the attempt on the part of the defendant here is, not so much to dispute the authority of that case, as its application to the case before us. However, I am of opinion, that, on the whole, we must consider that the foundation of this sentence of condemnation was the violation of *French* ordinances only, and consequently the case of *Pollard v. Bell* is a direct authority for the present."

Mr. Justice *Le Blanc*.—"It only remains to be considered, whether or not the warranty that the ship was an *American*, is negatived by the sentence of condemnation. We must look to the concluding part of this sentence to see the grounds on which the foreign court professed to decide. If that determination had been founded either on the law of nations, or on the treaty subsisting between *France* and *America*, we could not have enquired whether or not that court had formed a right decision. But if we see that that court condemned the ship and cargo, neither on the law of nations or on the treaty between *America* and *France*, then we are bound to declare, that such a sentence is not conclusive on the parties to this action: it does not affect the question respecting the warranty of neutrality. And I think the sentence is founded simply on an infringement of the *French* ordinances which are particularly pointed out in the sentence, and not any breach of the law of nations or of the treaty between *France* and *America*."

Judgment for the plaintiff.

Price v. Bell, 1 East's Rep. 663.

In a subsequent case upon a special verdict, the insurance was on a ship and goods, the ship being in fact an *American*, but not warranted to be so, and the case seems to turn, not on the point of enemy's property, but on this, whether the ship was documented as an *American* ship ought to have been according to its own laws and its treaties with other countries. She was provided with a passport, such as is constantly used by all *American*

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can ships, and all other usual papers, and a new muster roll, made upon oath before the Lord Mayor of *London*, several of his original crew having died, but all the new men being *Americans*, and signed and certified by the *American* Minister, having left the original muster roll with the said Minister. The ship sailed from *London* bound for *Charlestown*, the voyage insured, and was captured by a *French* privateer and carried into *L'Orient*. The sentence of the first tribunal stated the questions of law to be, Whether the new muster roll was in the legal form to supply the first list? And secondly, Whether the bills of lading and other papers touching the cargo prove the neutral property of it? It then proceeds with various considerations, of violated ordinances of *July* 1778, and a decree of the Executive Directory promulgating the ordinances of 1744 and 1778, and decrees the ship and cargo to be good prize: although one of the considerations is to this effect, considering in law that the register and sea letter prove the *American* property of the ship, but the log-book proves that the passport has served for several voyages, contrary to the formal regulations of the 4th article of the ordinance of *July* 1778. From this sentence, the captain appealed; but the superior court declared the former sentence valid, adding to the former ordinances, a law of the 29th *Nivose* last, expressing, "the state of ships in regard to what concerns their neutral or enemy's quality shall be determined by their cargo; therefore every vessel met at sea laden entirely or in part with goods the produce of *England*, shall be declared lawful prize, whoever may be the owner." This special verdict was argued three several times at the bar, and the Court took time to consider of their opinion, it appearing that the main difficulty of the case turned upon the question of an implied warranty, there being no express one.

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The Court did not decide that point, for they were ultimately of opinion, as was declared by Lord *Kenyon* in pronouncing their unanimous judgment, that supposing an implied warranty did exist, the sentences did not negative such a warranty, both the sentences appearing manifestly to have proceeded on the ground of a breach of *French* ordinances, which were contrary to the treaty between the two countries, were not adopted by it, nor is the condemnation expressed by the sentence to have been for acting contrary to the treaty. Judgment for the plaintiff.

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Baring v.
Royal Exch.
Ass. Comp.
5 East 99.

But where the foreign sentence professes to proceed on the ground of an infraction of treaty, such sentence is conclusive against the warranty, although inferences were drawn in such sentence from *ex parte* ordinances in aid of their conclusion that the treaty was broken.

The judgments of the Court of King's Bench, when so deliberately considered, as those just recited, seldom require illustration or confirmation : yet as a case has lately occurred in the Privy Council, upon an appeal from the Court of the Recorder at *Madras*, in which the case of *Pollard v. Bell*, and the principles there laid down were much debated at the bar, and a very learned judgment pronounced by Sir *William Grant*, the Master of the Rolls, the Board consisting at that time of himself, Sir *William Scott* (the Judge of the High Court of Admiralty), Sir *William Wynne* (the Dean of the Arches), and Lord *Glenbervie*, it is thought proper to insert that decision here. It is true the judgment was pronounced in favour of the underwriters : but upon advertng to the grounds of the decision it will appear, that their lordships so determined because they were of opinion that the sentence of the Court of Admiralty had expressly decided, *that the property was not neutral*, and of course had negatived the warranty of neutrality : and even if their lordships had erred in supposing the Court of Admiralty to have decided that point, still their decision would not negative any principle of law, as established by former cases.

Kindersley
and others
appellants v.
Chase and
others re-
spondents,
Cockpit,
July 21 &
22, 1801.

It was an insurance effected at *Madras* by the appellants, on account of the *Swedish Asiatic Company*, on the ship *Resolution*, Captain *Neale*, and the insurance was declared to be *on goods*, as interest may appear, and warranted *Swedish property*. The ship sailed with a valuable cargo, and being obliged to put into the *Isle of France* for refreshment, the ship and cargo were there seized as prize, and ultimately condemned. The Tribunal of Commerce in the *Isle of France*, after enumerating the various papers and documents found on board, proceeds to state, " That
" the legal questions for investigation and decision are, first,
" Whether the proceedings in regard to the fact of the seizure
" of the ship were carried on agreeably to the terms of the laws
" relative to proceedings in matter of prize? 2d, *Whether*, by
" the

“ the papers composing the said proceedings, and there produced by the respective parties, and also from the objections and exceptions severally taken, and by the terms of the regulations and ordinances made on the subject of the navigation of neutral vessels in time of war, *the said ship and her cargo must be considered as enemy's property, and as such confiscated to the use of the Republic; or whether on the contrary the said ship and her cargo must be considered as Swedish property, and restored to the claimants?*” The sentence as to the second question proceeds thus; “ considering that it appears, as well by the confession of the master on his examination, as by the declaration of the passengers and others of the crew, that he is an *Englishman* by birth. Considering that the character of a naturalized *Swede*, adopted by him in the proceedings, cannot be legally entertained; seeing that instead of providing by letters of naturalization from the King of *Sweden*, he only produces an act of his having taken the oath on the 14th *July* 1795, before the Burgomaster of *Gottenburg*, which is insufficient, by reason that every act of nationality or neutralization, can only be proved, according to the usage of the *European powers*, by an act issued by the prince himself. Considering that, even though this certificate of the oath having been taken, should be considered as equivalent to letters of naturalization, granted by the King of *Sweden*, it would want the condition required by law for its validity, as it could only have been made two years subsequent to the declaration of war with *England*, and would consequently be directly opposite to the words of the 6th article of the regulation of neutrals in 1778, which are as follows: “ No regard will any more be paid to passports granted by neutral powers or allies, as well to owners as masters of ships, subjects of states in enmity with his majesty, if they are not neutralized, or have not transferred their property to the states of those powers three months before the first of *September* of the present year.” Considering that it also appears, as well by the proceedings, as by the declaration of the crew, and that of Mr. *Gordon*, that the said *Gordon* is a *Scotchman*, consequently an enemy; that he was second captain on board the said ship *Resolution*; and that he certainly exercised the functions thereof from the period of his leaving *Europe*, and during the whole of the voyage; that this first officer was shipped at *Guernsey*, without any of the forms

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prescribed by law being observed, for proving the disembarkation of the person mentioned in the muster roll, as likewise the necessity of replacing him with an officer of an hostile power. Considering that the regulation of 1778, declaring lawful prize foreign vessels, on board of which there shall be a supercargo, merchant, clerk, or principal officer of an enemy's country, save in those cases as excepted in the 10th article, where the papers shall prove by documents found on board, that they were under the necessity of taking on board chief officers or sailors, at the ports they put into, to replace those belonging to a neutral country, which died in the course of the voyage; and the defendants do not in any manner prove it, agreeably to the directions and regulations. Considering that *the general invoice and bill of lading produced by the captain, the particular invoice of the cargo made by Kinderfley, Watts, and Company, and Colt, Day and Company of Madras, being unsigned*, cannot be received by the Court conformably to the 2d article of the same regulation. Considering that the papers produced by Captain Neale, *as well to establish the pretended character of an American*, as likewise to prove the existence of the necessity he was in to replace, at *Guernsey*, the first officer inserted in the muster roll by Mr. Gordon, are neither sufficient nor legal; and that even admitting them to be so, they could not be received by the Court, by reason that they were not delivered within the time prescribed by the terms of the 11th article of the same regulation. Considering that the cargo shipped by *Harrop and Stephenson of Tranquebar*, is for account of the operations of the ship *Resolution*, as appears by account current of the said gentlemen, of the 29th *March* 1797. Considering finally, that the King's letters of the 23d of *May* 1780, issued by order of the Colonial Assembly, and registered in the Tribunal, as forming part of the regulation of 1778, has no other object than to maintain the directions of the regulations, and to recommend circumspection to captains of armed ships towards neutral vessels. *Every thing considered*, the court administering justice, and without paying attention either to the points and demands, or to the matters of nullity contended for by the defendants in regard to the proceedings taken by the justice of peace, declare the seizure of the ship *Resolution* to be good and lawful, order the said ship and cargo to be condemned for the use of the republic.

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This case came on to be tried on the plea side of the Recorder's Court at *Madras*; and a verdict was given for the appellants, subject to the opinion of the Court upon a case reserved upon the single point as to the effect or operation of the sentence of the Court of Admiralty in the Isle of *France*, the Recorder (Sir *Thomas Strange*, now Chief Justice of the Supreme Court of Judicature lately constituted at *Madras*) being of opinion at the trial, that independently of the *French* sentence, the appellants had made out a sufficient case to entitle them to a verdict. Upon the argument of this case, Sir *Thomas Strange* gave judgment for the respondents, stating as the ground of his decision, that the Admiralty Court had considered the question, whether the property was enemy's or neutral, and had condemned it as enemy's, and consequently the warranty was conclusively disproved by that sentence.

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From this judgment the present appeal was brought, and after elaborate argument at the bar, the Lords of the Privy Council dismissed the appeal, and their judgment was pronounced by

The Master of the Rolls.—“It is necessary to make a few observations to shew the grounds upon which our opinion proceeds, confirming the judgment of the Recorder of the Court at *Madras*.

Sir William
Grant.

“The opinion, which we have formed as to the effect of the sentence of condemnation, makes it unnecessary for us to go into the consideration of all the questions that have been raised in the course of the discussion. With regard to one, which was started towards the conclusion of the argument, Whether a sentence of condemnation in an Admiralty Court can ever, in a Court of Common Law, be held to falsify a warranty in a policy of insurance of one, who is no party to it? I think it is not open to make that question. Till now, no objection has been made, on the part of the appellants, to the sentence *as evidence*, their *gravamen* was, not that it was received for the purpose for which it was offered, but that being received, it did not shew that the condemnation proceeded on the ground of enemy's property: that was the sole question agitated in the Court below. Supposing it had been open to raise that question, I conceive it must here at least have been raised in vain.

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for sitting here as a Court of Appeal from a Court of Municipal Law, we must decide according to those rules, which we find established for Courts of Municipal Law; and therefore we must decide a question on a policy of insurance, in the same manner as we find a Court in *Westminster-hall* would have decided such a question. Now it is quite clear, that from the time of Lord Hale down to the present period, it has been settled that a sentence of condemnation in a Court of Admiralty is conclusive. When it proceeds on the grounds of enemy's property, it is conclusive that the property does belong to enemies, not only for the immediate purpose of such a sentence, but it is binding on all Courts and as against all persons. This has been so clearly understood, that it was not ever controverted in the case of the Dutchess of Kingston, where the conclusive effect of all sorts of evidence was so ably discussed. It was admitted that the sentence of a Court of Admiralty, proceeding *in rem*, must bind all parties—must bind all the world. Now taking a sentence to be conclusive, when it has distinctly determined, that the property belonged to enemies, a question is made, Whether *this sentence* is to produce this effect? It is said every sentence of condemnation does not produce that effect; because by a great many decisions, it has been now established, that if it clearly appears, on the face of the sentence, that it was not on the ground of enemy's property that the condemnation proceeded, but that the Court bottomed itself on some distinct ground, in that case, the warranty of neutrality is not necessarily falsified by such a sentence of condemnation; and certainly there are several cases that have so decided. I have looked at them all, and not one of them will be contradicted by our decision on this case. It is generally to be presumed, that such sentences proceed on legitimate grounds; and therefore they are in general conclusive proof, with respect to the property; negating the warranty of neutrality, and proving the propriety of the condemnation. Hence it follows, that it does not lie on the party producing the sentence, to shew that it has proceeded on the ground of enemy's property; but it is incumbent on the other party, who objects to the sentence, to shew that it proceeded on some other ground. That I take to be the effect of these decisions; and therefore it is necessary here to shew some distinct and collateral ground, on which the sentence has proceeded, leaving the question of property entirely

undetermined: and accordingly in every one of the cases, in which the effect contended for by the underwriters has been denied to a sentence of condemnation, the court of common law has thought itself warranted in coming to this conclusion, that the sentence itself shews that the question of property was not, and was not professed to be, decided by the Court of Admiralty. What is the case here? The Court expressly tells us, what the questions were which they had to decide—One question was, “Whether the proceedings were regular? The other question was, Whether by the papers composing the said proceedings, and there produced by the respective parties, and also from the objections and exceptions severally taken, and by the terms of the regulations and ordinances, made on the subject of the navigation of neutral vessels in time of war, *the said ship and cargo must be considered as enemy's property*, and as such confiscated to the use of the republic? Or whether, on the contrary, *the said ship and her cargo must be considered as Swedish property, and restored to the defendants?*”

“Whether it was to be confiscated, according to that statement, depended as they say, on the question, Whether it was the property of enemies or of neutrals? If it was property of enemies, then it was to be confiscated, but if the property of neutrals, it was to be restored to the defendants. Then we find them determine, that it is to be confiscated for the benefit of the republic. Now we must strain very hard to make them contradict themselves in pronouncing the sentence of condemnation, if we say that they did not mean to determine any thing with respect to the property, when at the same moment they said, *the sentence depended entirely on the question of property*. It is said it appears from one of the reasons of their decision, that they must have proceeded on the ground of their own ordinance, particularly on the ordinance of 1778, which declares, “that the circumstance of having a supercargo or chief officer on board belonging to an enemy will be a sufficient ground of condemnation.” Now, supposing for a moment, it was chiefly, for certainly it was not solely, through that medium, that they arrived at the conclusion that it was enemy's property, would that have been sufficient to authorise us to treat the sentence as inconclusive?

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“Supposing they had stated the facts of the case, without any reference to the ordinance, could any man say that these facts were so irrelevant to the conclusions they have drawn of enemy's property, that a court of common law would have thought itself at liberty to go into the question, and see *whether the conclusion was warranted or not*? The court of King's Bench has always disclaimed such a jurisdiction. Then does it vitiate the sentence, that a court of competent jurisdiction has said there is an ordinance, which warrants and supports such a sentence? These ordinances have been misunderstood; sometimes by the courts of Admiralty themselves in *France*, and even (sometimes) by the courts in this country. The courts of Admiralty in *France* have sometimes considered these ordinances as making the law, and as binding on neutrals, and therefore have sometimes declared in the same breath that the property was neutral, and yet that it was liable to condemnation. Whereas all that was meant by those ordinances, was to lay down rules of decision conformable to what the lawyers and statesmen of the country understood to be the just principles of maritime law. When *Lewis* the 14th published the famous ordinance of 1681, nobody thought that he was undertaking to legislate for *Europe*, merely because he collected together, and reduced into the shape of an ordinance, the principles of the marine law as then understood and received in *France*. I say, as understood in *France*, for although the law of nations ought to be the same in every country, yet as the tribunals which administer that law are wholly independent of each other, it is impossible that some differences shall not take place in the manner of interpreting and administering it in the different countries which acknowledge its authority. Whatever may have been since attempted, it was not, at the period now referred to, supposed that one state could make or alter the law of nations; but it was judged convenient to declare certain principles of decision, partly for the purpose of giving an uniform rule to their own courts, and partly for the purpose of apprizing neutrals what that rule was. And it was truly observed at the bar in the course of the argument, that it has been matter of complaint against us, (how justly is another consideration,) that we have no such code, by which neutrals may learn how they may protect themselves against capture and condemnation. Now this court in this case seems to me to have well and properly under-

understood the effect of their own ordinances. *They have not taken them as positive laws binding on neutrals, but they refer to them as establishing legitimate presumptions, from which they are warranted to draw the conclusion, that is necessary for them to arrive at, before they are entitled to pronounce a sentence of condemnation.*

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“Supposing they had only stated the facts, as they are now before us, are they to be considered as so irrelevant, that a court of common law would say, “This sentence is repugnant to justice, and is unwarranted on the ground on which it has proceeded?” [The Master of the Rolls here enumerated the facts appearing on the *French* sentence, supposing them to have occurred in a *British* court of Admiralty, and then proceeded.] “Supposing all these circumstances to be brought before a court of Admiralty in this country, I think it would be questionable, whether they would have permitted further proof: I apprehend the property would hardly have escaped condemnation in the first instance. What is the result of all the cases that have been determined? From them all, Mr. Justice *Le Blanc* collects this principle, namely, *that a sentence of a court of Admiralty is conclusive as to all it professes to decide.* Now is it possible to say, that this Court did not profess to decide, whether this was or was not enemy’s property. It was the only question they did profess to decide, for there is no other question stated by them upon which their decision could proceed, except that of, *Whether the property belonged to enemies or neutrals?* And therefore we do not only not contradict any case, that has been decided, by affirming the judgment of the Court below; but we are bound so to do, by all the principles of these cases: and we should contradict them if we did not affirm the sentence of the Court of *Madras*.”

Vide his
opinion in
Pollard v.
Bell.

Lord *Glenbervie*.—“I only wish to make one observation on the case of *Pollard v. Bell*. It seems quite otherwise as to the fact in that case, from this which has been so ably stated here; and I entirely concur in opinion, as it has been now delivered. In the case of *Pollard v. Bell*, the *French* court did not profess to go on the ground of enemy’s property. Here they do profess to go on the ground of enemy’s property. Whether they ought or ought not to have come to this conclusion is another question, but it is

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clear that in *Pollard v. Bell*, that particular court did not do so; it did not decide on the ground of enemy's property or not; but they declare merely, that the ship is confiscated because she had a belligerent captain or supercargo on board. Now that being the case, and the sentence not having so professed to proceed, the very first fact that was stated in that case was, that *the ship was neutral property*. The warranty was on the ship, though the insurance was on the goods on board; that being so, it appears that that case is not at all on the facts of it, resembling this."

Sir William Scott.—"From the case of *Pollard v. Bell*, it appears clearly, that the *French* Court of Admiralty had been guilty of great inattention in their own edicts; but by this inaccuracy they brought the facts out distinctly to the view of an *English* court of common law, and thereby enabled them to give the decision they had given." Judgment affirmed.

Oddy v. Be-
vil, 2 East's
Rep. 473.

In a still more recent case, one of the points was, as to the conclusiveness of an Admiralty sentence. Mr. Justice Lawrence and Mr. Justice Le Blanc said, that, after the repeated determinations on the subject, they could not allow the question to be again argued, unless the matter could be carried by appeal to the House of Lords, which, in the present case, it could not be, from the shape in which that cause stood before the court.

Lothian &
another, v.
Henderson
and another,
3 Bos. &
Pull. 499.

But the point was at that very time depending in the House of Lords, upon an appeal from *Scotland*, and upon the second hearing of which, all the Judges were summoned. I was one of the counsel, and, by the express order of their lordships, in order to set this point at rest for ever, we were desired to argue at the bar the question of the admissibility in evidence of a sentence of a foreign Court of Admiralty, in an action upon a policy of insurance, in order to falsify a warranty of neutrality. And after mature deliberation, although there was some difference of opinion about some special circumstances, all the Judges were unanimous in declaring, that after the continued practice which had taken place from the earliest period, in which, in actions on policies of insurance, questions had arisen on warranties, to admit such sentences as evidence, not only as conclusive *in rem*, but also as conclusive of the several matters they purposed to decide directly, it was too late to examine the practice of admitting them

to the extent, to which they had been received, supposing that practice might have at first appeared to have been doubtful, upon the argument, that, on the authority of those decisions, men had acted for a long series of years, and entered into contracts of assurance in this country, with a perfect knowledge of such decisions, and in expectation of the questions arising out of such contracts, to which such decisions are applicable, being ruled by them. And as to the supposed uncertainty that had prevailed in our Courts upon the construction of foreign sentences, Lord *Alvanley*, Chief Justice of the Court of Common Pleas, said the doctrine laid down in *Kinderley v. Chase* (*supra*) appeared to him best calculated to do away that uncertainty.

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Lord *Ellenborough*, Ch. J. of the King's Bench, who was necessarily absent at *Guildhall* when the House of Lords decided the cause of *Lothian v. Henderfon*, but whose concurrence in the judgment then pronounced was declared by Lord *Eldon* (Lord Chancellor), had soon after an opportunity of declaring from the bench of his own court what he conceived to be the effect of that decision. In delivering the judgment of the Court in *Bolton v. Gladstone*, his Lordship said, "Since the judgment of the House of Lords in *Lothian v. Henderfon*, it may now be assumed as the settled doctrine of a Court of *English* law, that all sentences of foreign Courts of competent jurisdiction to decide questions of prize, are to be received here as conclusive evidence in actions upon policies of assurance, upon every subject immediately and properly within the jurisdiction of such foreign Courts, and upon which they have professed to decide judicially."

Bolton v. Gladstone,
5 East. 155.

But they must decide upon the point distinctly, in order to affect a warranty or representation in a policy of insurance. That they meant to decide the point is not to be collected by inference or argument, but by specific affirmation. Lord *Ellenborough* so declared on the trial of an action on a policy of insurance on the ship *Juno*, represented as an American, at and from London to Africa, during her stay and trade there, and from thence to her port or ports of discharge in the *West Indies*.

Fisher v. Ogle,
Sittings after
Trin. 1808.
1 Camp.
N. P. Cal.
418.

The ship was captured by a *French* privateer, carried into *Martinique*, and there condemned in the Vice-Admiralty Court

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Court. To falsify the representation of neutrality, the defendant now gave in evidence the sentence of condemnation. This stated, "that it resulted evidently from the papers on board; that the expedition of the said ship *Juno*, her cargo, and the operations of her captain on the coast of *Africa*, were for account of the brothers *Geddes*, merchants of *London*, who had, to masquerade the English property of this outfit, borrowed the American flag and passport of the said ship *Juno*, and taken for their agent and partner in this expedition Captain *Fischer*, furnished with a certificate of a citizen of the United States." The sentence afterwards went on to declare as good and valid prize the slave ship *Juno*, and to confiscate the said ship and her cargo to the profit of the captors, without stating any specific grounds for the condemnation.

Lord *Ellenborough*. "We shew a sufficient respect for French sentences, if we attach credit in our courts to what they distinctly say. It is often painful to go this length, considering the piratical way in which they proceed. But this sentence does not say that the ship was not *American*; and it is not to be considered as evidence of what it does not specifically affirm. I dare say such sentences will be positive enough in future, since those who frame them are disposed to consider every thing as good prize against all mankind. When they do speak out, I will give them the same effect here which they receive in other places. But there is no proof in the present case that the property was not *American*, although such an inference might be drawn from certain indirect statements in the sentence now presented to us." Verdict for the plaintiff.

11 Joh. T.
49 G. 3.

In the ensuing term a motion was made for a new trial: and it was contended by the counsel for the defendant, that it necessarily resulted from the terms of the sentence of the *French* Admiralty Court, that the Ship *Juno* and her cargo were not *American*, although this was not positively averred in any part of it; and that, according to the principle of former decisions, the sentence of a foreign Court of competent jurisdiction must be taken as conclusive evidence of the facts upon which it evidently proceeds.

Lord *Ellenborough*. "I must look at the adjudicative part of the sentence; and there I find nothing distinctly stated as to the ship

ship or her cargo not being *American*. Is there any case in which it has been held that Judges must fish for a meaning, when a sentence of this kind is produced to them. Here the foreign Court seems not to have any settled opinion upon the subject, and not to have known or cared on what grounds it proceeded to a condemnation. It is by an overstrained comity that these sentences are received as conclusive evidence of the facts which they positively aver and upon which they specifically profess to be founded.

The other Judges were of the same opinion, and the rule was refused.

The general result of all these cases seems to be this; that where a man has warranted, by his contract of insurance, that his property is neutral, and the belligerent country condemns that very property as belonging to an enemy, however absurd that decision may be, this is conclusive evidence that the warranty contained in the contract is false: but if the belligerent country condemn as prize, not adverting to the question of neutrality at all, but stating the ground to be a violation of some rule, which they have adopted for their own government in the decision of questions of prize, it may or may not be a just ground of condemnation as between the belligerent and the neutral, but it cannot at all operate to prove the truth or falsehood of a fact, asserted in a contract of insurance, and which may be perfectly true, quite consistently with the justice of their decision. The following case proceeds entirely on this principle; for the *French* sentence does not once mention the question of neutrality.

In an action on a policy of insurance on the captain's goods and private adventure, warranted *American* property, on board the ship *Friends*, at and from *London* to *Virginia*, a sentence of a *French* Court of Admiralty was produced, which was to the following effect: "Forasmuch as the true destination of the
" ship was for the *English* islands, having been hired and loaded
" at *London*, and that there has been found on board her 80 barrels of gunpowder; the court declares the said brig *Friends*,
" together with her cargo, a good prize."

Calvert v.
Bovill,
7 Term,
Rep. 523.

The court of King's Bench held that this sentence was not conclusive against the warranty of neutrality, the facts of the case

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case and the reasons expressly given, leading to a contrary conclusion. If the sentence, indeed, had condemned the goods, because they were the property of an enemy, that judgment would have been conclusive, but they have given other reasons for their sentence.

The following case upon the forfeiture of neutrality has been as to one of the main points of it, namely the right of nations at war, to search neutral ships, overturned by a decision of the High Court of Admiralty, and also by one in the Court of King's Bench.

Salweel v.
Johnson,
B. R. Hil.
25 Geo. III.

It was an action brought upon a policy of insurance on the ship *Thetis*, a *Tuscan* ship, warranted neutral. At the trial a verdict was found for the plaintiffs, subject to the opinion of the Court, upon a case stating, That the plaintiffs were *Tuscan* subjects resident at *Leghorn*, and the sole owners of the ship in question: that the ship, having neutral goods on board consigned to *London*, was captured off the coast of *Barbary* by a *Spanish* vessel: That she was carried into *Spain*, and there condemned as prize; which sentence upon appeal to a superior court, was reversed: but upon further appeal, the last sentence was reversed, and the first confirmed. That the grounds of condemnation were two; 1st, That the ship *Thetis* refused to be searched, and resisted with force, having fired at the ship of the *Spaniard*, and continued firing, after the *Spanish* colours were hoisted: 2d, That the *Thetis* had no charter-party on board. The captain answers these two grounds thus: 1st, That he resisted and fired, the *Spaniard* having hailed him under false colours: 2d, That he had taken the goods on board by the piece, and that she was a general ship; in which case a manifesto was sufficient, without a charter-party. The sentence of the last court admits the ship to be neutral; for it states it to be "the ship *Thetis*, a *Tuscan* ship, &c." but condemns her as good and lawful prize.

Lord Mansfield was absent at the argument of this case.

Mr. Justice Willes.—"This is clearly a neutral ship. Something was said in argument about barratry; but I do not think the act of the captain in this case amounts to that offence. The
second

second ground of condemnation is given up by the counsel ; and the remaining question is, whether the captain has been guilty of such a breach of neutrality, as should affect the owners. If a ship be neutral, and she be stopped, those, who stop her, must pay for the detention. But it is said she must stop to be searched. I find no authority for such a position. Besides, the circumstances are very suspicious. The captain seems to have acted properly. Stoppage is always at the peril of the captors."

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Mr. Justice *Abbott*.—"I take the principle laid down at the bar to be true, that a ship warranted neutral must conduct herself so as not to forfeit her neutrality. But the facts of this case do not admit of the application. I do not find, that a neutral ship must submit to be searched. It is rather an act of superior force, always resisted when the party is able ; and the right falls within this position, that the searcher does it at his peril. If he find any thing contraband, or the property of an enemy, he is justified : if not, he pays costs. Is there any thing to justify the search in this case ? Certainly not, for the cargo was neutral. As to the next question, her not having a charter-party, this clearly is not required by the law of nations ; and it appears from the case that she was a general ship, and although it may be contrary to a particular ordinance of *Spain* to sail without a charter party, other nations are not bound to take notice of such ordinance, unless in virtue of some treaty subsisting between two states, by which they submit to be bound by such ordinance. That is not the case here, and therefore it falls within one of the perils insured against."

Mr. Justice *Buller*.—"It is not necessary to give an opinion as to barratry ; but I take it to mean a wilful act of the captain to the injury of the owners. This would have been barratry, if it had been an act, which forfeits the neutrality. I do not agree that the property must continue neutral during the whole voyage. If it be neutral at the time of sailing, it is sufficient ; and if a war break out next day, the underwriter is liable. The answer given to the claim of search is conclusive, that the party does it at his peril ; just like the case of Custom-house officers. The practice of the Admiralty confirms it ; for they give costs in cases of improper detention : which they would not do, if neutral ships were, at all events, liable to be stoppt. Detention by particular ordinances,

Vide supra.

C H A P. ordinances, which do not form a part of the law of nations, is a
XVIII. risk within the policy. At first I compared this case in my own
 mind to that of an illegal voyage; but they are no way similar; for a ship is only bound to take notice of the laws of the country she sails from, and of that to which she sails; but not the particular ordinances of other powers." Judgment was accordingly given for the plaintiff.

Gawells v. Kennington. This case, thus decided, came under the consideration of the
8 Term Rep. Court of King's Bench in the year 1799. It was an action on a
230. policy on goods in the ship *Dispatch*, warranted *Danish ship and property*. The loss was alleged to be by capture. A sentence of a *British* Court of Admiralty was produced, stating, that the said neutral ship *Dispatch*, with the cargo, being *Danish* property, had been under the authority of the law of nations and of war, and agreeably to existing treaties stopped and detained by the commander of one of his majesty's ships, and by him sent towards the port of *Mole S. Nicholas*, for the purpose of being legally examined, under the command of *Barrett*, a midshipman, and two seamen; and that on the near approach to the port, the master, supercargo, and crew of the said ship, had, in direct violation and breach of their neutrality as *Danish* subjects, and contrary to the law of nations and the faith of treaties, forcibly rescued and taken and kept possession thereof till again captured by a *French* privateer, and she was again captured by one of his majesty's ships; and the said neutral ship and cargo were therefore adjudged good prize.

The Court was of opinion, that the sentence of the Court of Admiralty was conclusive that this vessel had so conducted herself as to forfeit her neutrality; by acting in violation of that neutrality, and contrary to the law of nations and faith of treaties. That as to the question concerning the right of searching neutrals, it was said by the Court, that before the late armed neutrality it was considered in this country, and so decided in many cases, that the right of searching neutrals was part of the law of nations; and that such right was supposed to be founded on reason. Judgment was given for the defendant.

The Court, however, in the above case, said, they did not mean to overturn the case of *Salousci v. Johnson*, for in that case the Court of Admiralty had not adjudged, as in the present case, that

that the ship had forfeited her neutrality. But the general point there mentioned that a neutral ship need not submit to be searched, cannot be supported; for it is laid down in *Vattel*, that this right clearly exists, without which the commerce of contraband goods could not be prevented.

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Vattel, book
3. ch. 7.
l. 114.

Besides which, in a late case in the Court of Admiralty, Sir *William Scott* thus states the law: "That the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruizers of a belligerent nation; because till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining those points, that the necessity of this right of visitation and search exists. This right is so clear in principle that no man can deny it, who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient enquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule, *that free ships make free goods*, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice, for practice is uniform and universal upon the subject. The many *European* treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of *Hubner* himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind, has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force, something in the nature of civil process, where force is employed, but a lawful force, *which cannot lawfully be resisted*." In another place, this very learned person adds, "The penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search (a)."

The Maria, Paulsen, Master, decided the 11th June 1799, and the report published by Dr. Robinson.

(a) I am sorry that I cannot transcribe more of this judgment, so fraught with learning, and so eloquent in its composition: but it is the less to be lamented, as Dr. *Robinson* has gratified the public by publishing it entire, as pronounced, in a pamphlet intitled *a Report of the Judgment, &c. on the Swedish Convey*.

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These are the cases which have been decided, relative to the judgments of foreign courts being conclusive, and the effects which they have upon the contract of insurance: and from all of them it should seem, that this general doctrine may be collected: That wherever the ground of the sentence is manifest, and it appears to have proceeded expressly upon the point in issue between the parties; or wherever the sentence is general, and no special ground is stated, there it shall be conclusive and binding, and the courts here will not take upon themselves, in a collateral way, to review the proceedings of a forum, having competent jurisdiction of the subject matter. But if the sentence be so ambiguous and doubtful, that it is difficult to say on what ground the decision turned; there evidence will be allowed in order to explain. And if the sentence upon the face of it be founded upon partial ordinances alone, the insured shall not be deprived of his indemnity; because, to use the words of Mr. Justice *Buller*, any detention, by particular ordinances or decrees, which contravene, or do not form a part of the law of nations, is a risk within a policy of insurance.

*Thellusson
v. Shedden,
2 New Rep.
228. and
see Stat.
43 Geo. III.
ch. 160.
L 40.*

If an insured declare upon a total loss by capture, and after proving a capture shew that a re-capture took place, upon which proceedings were had in the Admiralty, the Court of Common Pleas held he cannot recover even the amount of the salvage, proceedings and sale from the insurers, without proving the proceedings in the Admiralty under the seal of that Court, if the insurer chuses to insist upon it.

CHAPTER THE NINETEENTH.

Of Return of Premium.

HAVING in several chapters spoken fully of the various cases, in which policies of insurance are either absolutely void, or are rendered of no effect by the failure of the insured in the performance of some of those conditions, which he had taken upon himself: the next object of our inquiry will be, in what cases, and under what circumstances, there shall be a return of premium.

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In all countries, in which insurances have been known, it has been a custom, coeval with the contract itself, that where property has been insured to a larger amount than the real value, the insurer shall return the overplus premium; or if it happen that goods are insured to come in certain ships from abroad, but are not in fact shipped, the premium shall be returned. If the ship be arrived before the policy is made, and the underwriter is acquainted with the arrival, but the insured is not, it should seem the latter will be entitled to have his premium restored, on the ground of fraud. But if both parties be ignorant of the arrival, and the policy be (as it usually is) *lost or not lost*, I think in that case the underwriter should retain; because under such a policy, if the ship had been lost, at the time of subscribing, he would have been liable to pay the amount of his subscription. The parties themselves frequently insert clauses in the policy, stating, that upon the happening of a certain event, there shall be a return of premium. These clauses have a binding operation upon the parties; and the construction of them is a matter for the court, and not for the jury, to determine.—In short, if the ship, or property insured, was never brought within the terms of the written contract, so that the insurer never has run any risk, the premium must be returned.

Loccenius
de jure
marit. l. 2.
c. 5. §. 8.

1 Mag. 90.

Dougl. 268.

1 Ves. 319.

The principle upon which the whole of this doctrine depends, is simple and plain, admitting of no doubt or ambiguity. The risk

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Pothier,

n. 179.

3 Burr.

9240.

Roccus,

Not. 22.

Cowp. 662.

risk or peril is the consideration for which the premium is to be paid: if the risk be not run, the consideration for the premium fails; and equity implies a condition, that the insurer shall not receive the price of running a risk, if, in fact, he runs none. It is just like the contract of bargain and sale; for if the thing sold be not delivered, the party who agreed to buy, is not liable to pay. Thus to whatever cause it be owing, that the risk is not run, as the money was put into the hands of the insurer, merely for the risk of indemnifying the insured, the purpose having failed, he cannot have a right to retain the sum so deposited for a special cause.

Martin v.

Sitwell,

2 Show. 156.

Accordingly in an action of *indebitatus assumpsit* brought by the plaintiff for 5*l.* received by the defendant to the plaintiff's use, where the general issue was pleaded; it appeared in evidence, that one *Barkdale* had made a policy of insurance upon account for 5*l.* premium in the plaintiff's name, and that he had paid the said premium to the defendant, and that *Barkdale* had no goods then on board, and so the policy was void. To this action two objections were taken: 1st, That it should have been brought in *Barkdale*'s name, which was over-ruled. 2dly, That this ought to have been a special action on the custom of merchants. Lord Chief Justice *Holt* cited a case of money deposited upon a wager concerning a race, that the party winning might bring an action of *indebitatus assumpsit*, for money received to his use; for now by the subsequent matter it is become as such. And as to the case in question, the money is not only to be returned by the custom, but the policy is made originally void, the party, for whose use it was made, having no goods on board; so that by this discovery the money was received without any reason, occasion, or consideration, and consequently it was received originally to the plaintiff's use. And so judgment was given for the plaintiff.

I cite this case for two purposes; because it serves to shew in what form of action the plaintiff ought to demand a return of premium: and it also points out, that as early as the beginning of the reign of *William & Mary*, the true principle, on which the premium ought to be returned, was fully established. It was said in the introduction to this chapter, that clauses are frequently inserted in policies of insurance, containing con-
ditions,

ditions, on the performance or non-performance of which, the premium is returnable; and that to decide upon the construction of such conditions is the province of the Court, and not of the jury. Such a case occurs, which may properly be mentioned here.

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This action was brought against an underwriter, for a return of premium. The material part of the policy was in these words: "At and from any port or ports in *Grenada to London*, "on any ship or ships that shall sail on or between the first of "May and the first of *August 1778*, at 18 guineas *per cent.* to "return 8*l. per cent.* if she sails from any of the *West India Islands*, "with convoy for the voyage, and arrives." At the bottom there was a written declaration that the policy was on sugars (the muscovado valued at 20*l. per hoghead*) for account of *L. Q.* being on the first sugars which shall be shipped for that account. The ship the *Hankey* sailed with convoy, within the time limited, having on board 51 hogheads of muscovado sugar, belonging to *L. Q.* She arrived safe in the *Downs*, where the convoy left her; convoy never coming farther, and indeed seldom beyond *Portsmouth*. After she had parted with the convoy, she struck on a bank called the *Pan Sand*, at *Margate*, and 11 of the 51 casks of sugar were washed overboard, and the rest damaged. The ship was afterwards got off the bank, and proceeded up the river, arrived safe in the port of *London*, and was reported at the custom-house. The sugars saved were taken out at *Margate*, and, after undergoing a sort of cure, by a person sent from town for that purpose, they were carried to *London* in other vessels; and the 40 hogheads being sold, produced 340*l.* instead of 800*l.* which was their valuation in the policy. The defendant had paid into court the value of the sugars lost, and a return of 8*l. per cent.* on 340*l.* The plaintiffs insisted, that they were entitled to have 8*l. per cent.* also returned on the valued price of the eleven hogheads of sugar which were lost, and on the difference between what the remaining forty hogheads produced, and their valued price. At the trial, before Lord *Mansfield*, the plaintiffs had a verdict to the full amount of their demand. The chief question, upon the motion for a new trial, was, To what the word "*arrives*" was intended to apply?

Simond and
another v.
Boydell,
Doug. 255.

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Lord *Mansfield*.—"The ancient form of a policy of insurance, which is still retained, is, in itself, very inaccurate; but length of time, and a variety of discussions and decisions, have reduced it to certainty. It is amazing, when additional clauses are introduced, that the merchants do not take some advice in framing them, or bestow more consideration upon them themselves. I do not recollect an addition made, which has not created doubts on the construction of it. Here a word or two more would have rendered the whole perfectly clear. However, I have no doubt how we must construe this policy. Dangers of the sea are the same in time of peace and of war; but war introduces hazards of another sort, depending on a variety of circumstances, some known, others not, for which an additional premium must be paid. Those hazards are diminished by the protection of convoy, and if the insured will warrant a departure with convoy, there is a diminution of the additional premium. If the insured will not warrant a departure with convoy, he pays the full premium, and in that case the underwriter says, "If it turn out that the ship departs with convoy, I will "return part of the premium." But a ship may sail with convoy, and be separated from it by a storm, or other accident, in a day or two, and lose its protection. On a warranty to sail with convoy, that would not be a breach of the condition; but to guard against that risk, the insured adds, in policies of the present sort, "the ship must not only sail with convoy, but she must "arrive, to entitle me to the return." The words, *and arrives*, do not mean that the ship shall arrive in the company of the convoy, but only that she herself shall arrive. If she does, that shews, either that she had convoy the whole way, or did not want it. But, in the stipulation for the return of premium, no regard is had by the parties to the condition of the goods on the arrival of the ship. The construction, contended for by the defendant, is adding a comment longer than the text. If it had been meant that no return should be made, unless *all* the goods arrived *safe*, they would have said, "if the ship arrive *with all "the goods*," or "*safely with all the goods*." The total or partial loss of the goods was the subject of the indemnity, and must be paid for by the underwriter. But, as to the return of the additional premium, whether the goods arrive safe or not, makes no part of the question. The single principle which must govern

Vide ante,
c. 18.

is, that in the events which have happened, the war risk has been rated too high."

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Mr. Justice *Willes*, and Mr. Justice *Asbhurst*, were of the same opinion.

Mr. Justice *Buller*.—"I am of the same opinion. *The question is for the decision of the Court, not of a jury*, since it arises on the construction of a written instrument. What gives rise to an increase of the premium? The danger of capture. When that danger is diminished, the construction must be, that there shall be a proportional return of premium." The rule for a new trial was accordingly discharged.

So also in a later case, where, in a policy on freight, this clause was found, "to return 10l. *per cent. if the ship sailed with convoy and arrived*;" it was contended at the bar that, although the ship sailed with convoy, and although she arrived at her port of destination; yet as she had been captured and recaptured during the voyage, and had paid salvage to the re-captors, the plaintiffs (the assured) were not entitled to a return of premium within the true construction of the above clause.

Aguilar and
others v.
Rodgers,
7 Term Rep.
421.

Lord *Kenyon* delivered the unanimous opinion of the Court: I agree with the counsel for the defendant, that every arrival of the ship at her port of destination would not be an arrival within the fair construction of this memorandum; such, for instance, as an arrival in the possession of an enemy at a neutral port; or an arrival at her port in *England* as the property of other persons after a capture. But in order to satisfy the meaning of the memorandum, it should be *an arrival at the destined port in the course of her voyage*. It is now too late to controvert the authority of *Hamilton v. Mendes*, even if we were disposed to do so, which I am not, where it was holden that though the assured may abandon, on hearing of a capture, yet if they do not abandon, and the ship be afterwards recaptured, it must be considered as if she had never been out of the possession of the owners. It is 18 years since the case of *Simond v. Boydell* was decided; that case must be well known in the commercial world; and if the parties in this case had intended to make an agreement different from that which the words used in this me-

morandum

C H A P. memorandum import, they would have added after *arrived*, “safely
XIX. “from the enemy,” or some words to that effect. But the words here used are not equivocal; and we ought not to depart from them: it would be attended with great mischief and inconvenience if in construing contracts of this kind we were not to decide according to the words used by the contracting parties. Suppose this question had arisen on a contract under seal, and an action of covenant had been brought, assigning as a breach the non-arrival of the ship at the port of *London*, the answer that in fact the ship did arrive there in the course of her voyage would have been decisive. And if so, this memorandum must receive the same construction in this action. On the grammatical construction of the words, which is the safest rule to go by, I am of opinion that the verdict obtained by the plaintiff ought not to be set aside (a).

Cowp. 668. By the law of *England*, it has been clearly settled, that whether the cause of the risk not being run, is attributable to the *fault, will, or pleasure* of the insured, still the premium is to be returned. Foreign writers have in some measure differed in opinion upon this point; and it may not be improper to observe how far they vary or agree with our own. The *Italian* writers agree with us, that the contract in question is conditional, and that the risk is the very essence and main spring of the whole. But still they insist and contend, that it is not lawful for the assured, by *their own act*, to break the contract; and that in such a case, the insurer is not obliged to return the premium.

Audley v. Duff, 2 Bos. & Pull. 111. So where the words were, *if she depart from Portugal and arrive*. **Everard v. Hollingworth, 2 Bos. & Pull. 111.** in the note. (a) In a late case in the Common Pleas, there was the following clause for a return of premium in a policy “at and from *Oporto* to *Lynn*, with liberty to touch at any ports on the coast of *Portugal* to join convoy, particularly at *Lisbon*, to return 6*l. per cent.* if she sail with convoy from the coast of *Portugal* and arrive.” The ship sailed from *Oporto* under the protection of a sloop and cutter appointed to protect the trade of that place to *Lisbon*, from whence it was to sail under a larger convoy to *England*. In the way to *Lisbon*, the fleet was dispersed, and this ship ran for *England* and arrived. It was contended that this ship had not sailed from the coast of *Portugal* with convoy. But the Court held, that having sailed from *Oporto*, with a convoy duly appointed, with a *bona fide* intention to proceed to *England*, though by desire of the Admirals, *Lisbon* was to be taken in the way, the condition, on which the return of premium was to be made, had been performed.

Kellner v. Le Mesurier, 4 East, 396. In all these cases where the words *and arrived* follow other conditions, those words annex a condition which overrides all the other stipulations; and no arrival at any intermediate stage will do, unless the vessel arrives at its ultimate port of destination. See ante p. 326. on another point.

They

They hold indeed, that if the voyage be put an end to by any accident, such as the ship being burnt, or by public authority; or if more goods were *bond fide* insured than were actually on board: in the former cases, the whole; and in the latter, a proportional part of the premium should be returned. But if a man say he has goods on board, and insure them, knowing that he has none, they ask this question: "An affecuratore tenetur restituere pretium, eo quod in navi non fuerunt merces? Videbatur affecuratore teneri ad restitutionem pretii recepti: sed in contrarium est veritas, quod non solum non teneatur pretium restituere, imo possit patere illud; et ratio est, quia licet emptio periculi non teneat in præjudicium promissoris, tamen in ejus favorem, et in præjudicium affecurati falsa assertio bene tenet."

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Roccus,
Not. 15. 82.
88.

Roccus,
Not. 17.

Santerna,
part 3. n. 22.

The *French* law-givers have, however, decided upon this point agreeably to our laws; and have accordingly, in the famous ordinances of *Lewis* the Fourteenth, inserted an article declaring, that if the voyage is entirely broken up before the departure of the ship, *even by the act of the insured*, the insurance shall be void, and the underwriter shall return the premium, reserving one half *per cent.* for his trouble. This article affords some scope to *Valin*, the very learned commentator upon these ordinances, to point out the advantages which the insured enjoys above the insurer, in being thus able to put an end to the contract, even after it is signed, which the underwriter can by no means effect. Indeed, when we consider that the premium is nothing more than the price of the perils, which the underwriters ought to run; and that the obligation to pay the premium contains this tacit condition, "I will pay *if the insurers run the risk*;" it is perfectly consistent with that principle, that when the risk is not run, whatever be the cause, the premium is not due to the insurers. Accordingly in *England*, it has always been the custom, when the policy is cancelled, to return the premium, deducting one half *per cent.*

2 Emerigon,
151. Ord.
of Lew. 14.
tit. Affur.
art. 37.

2 Val. 93.

Pothier,
Not. 179.

Molloy, l. 2.
c. 7. f. 12.

The generality of the rule here established would seem to extend it even to cases of fraud on the part of the insured. But the laws of *France*, upon this subject, have declared, that the insured shall be obliged to restore to the insurer, whatever he has received from him, and also to pay him double the pre-

Ord. of Lew.
14. tit. Insur.
art. 41.

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Vide ante,
c. 10.
p. 283.

mium. This question relative to a return of premium, in cases of fraud, was very fully discussed in the chapter of fraud, and all the cases fully cited; to that chapter therefore I must now refer the reader.

See ante,
c. 13. p.
333.

Some of the statutes for preventing the exportation of wool, and other staple commodities of the kingdom, and which, in order more effectually to prevent such exportation, have declared policies of insurance on those articles to be null and void, have enacted that the premium shall not be restored to the insured.

37 Geo. II.
c. 37.
Vide supra,
c. 14.

When a policy is void, being made without interest, contrary to the statute of the 19th Geo. the Second, *if the ship has arrived safe*, the Court will not allow the insured to recover back the premium; according to the old rule of law, *in pari delicto potior est conditio possidentis*. But in the decision of the case, in which this doctrine was held, the court seemed to rely much upon the distinction of contracts executed and executory: that this was a contract *executed*, the ship having arrived before the demand was made; but when a contract *executory* is to be rescinded, it can only be done upon the equitable terms of putting all parties in their original situation. Mr. Justice *Willes* in this case differed in opinion from the rest of the court, for reasons delivered by the learned judge, and which will appear in their proper place.

Lowry and
another v.
Bourdieu,
Doug. 463.
Vide ante,
p. 365.

The plaintiffs had lent to *Lawson*, captain of the *Lord Hol'and East Indiaman*, 26,000*l.* for which he had given them a common bond, in the penal sum of 52,000*l.* While he was with his ship at *China*, the plaintiffs got a policy of insurance, underwritten by the defendant and others, which was in the following terms: "At and from *China* to *London*, beginning the adventure upon the goods from the loading thereof on board the said ship at *Canton* in *China*, &c. and upon the said ship, from and immediately following her arrival at *Canton*, valued at 26,000*l.*, being the amount of Captain *Patrick Lawson's* common bond, payable to the parties as shall be described on the back of this policy: and it bears date the 16th day of *December*, 1775; and in case of a loss, no other proof of interest to be required than the exhibition of the said bond: warranted free from average and without benefit of salvage to the insurer." At the head of the subscriptions

subscriptions was written, "*On a bond as above expressed.*" C H A P.
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 Captain *Lawson* sailed from *China*, and arrived safe with his privilege (as it is called) or adventure, in *London*, on the first of *July* 1777, none of the events insured against having happened. The receipt of the premium was acknowledged on the back of the policy. The insured brought this action for a return of the premium, on the ground that the policy being without interest, the contract was void. The cause came on before Lord *Mansfield*, at *Guildhall*, when his Lordship was of opinion, that the policy was a gaming policy, prohibited by the statute of 19 *Geo.* 2. c. 37. and both parties equally guilty of a breach of the law; that the rule, therefore, of *melior est conditio possidentis*, was applicable to the case, and the plaintiffs could not recover the premium. A verdict was accordingly found for the defendant, agreeably to his Lordship's directions; but, the next morning, he expressed a doubt as to the propriety of his opinion, because the money had been paid upon an executory agreement, which could never have been completed. A new trial was then moved for, and fully argued.

Lord *Mansfield*.—"It is certainly true, in many instances, that first thoughts are best. I am now very much inclined to my first opinion. There are two sorts of policies of insurance: mercantile and gaming policies. The first sort are contracts of indemnity, and of indemnity only; and from that principle a great variety of decisions and consequences have followed. The second sort may be the same in form; but in them there is no contract of indemnity; because there is no interest on which a loss can accrue. They are mere games of hazard; like the cast of a die. In the present case, the nature of the insurance is known to both parties. The plaintiffs say, "We mean to "game; but we give our reason for it; Captain *Lawson* owes "us a sum of money, and we want to be secure, in case he "should not be in a situation to pay us." It was a hedge, but they had no interest; for if the ship had been lost, and the underwriters had paid, still the plaintiffs would have been entitled to recover the amount of the bond from *Lawson*. This then is a gaming policy, and against an act of parliament; and therefore it is clear that the Court will not assist either party; according to the well-known rule that *in pari delicto*, &c. Not that the defendant's right is better than that of the plaintiffs, but they must

C H A P. must draw their remedy from pure fountains. I have returned
 XIX. to my old opinion; sometimes you miss the mark, by taking too
 long an aim."

Vide ante,
 c. 10.

Mr. Justice *Willes*.—"I shall make no apology for differing from the rest of the court in a case where such great abilities have entertained two different opinions. The premium has been paid, and yet no risk run; for the policy was void from the beginning, and the insured could not have recovered from the underwriters if the ship had been lost. But I cannot think it a gaming policy. It does not appear to me that the parties had any idea they were entering into an illegal contract. The whole was disclosed, and they *thought* there was an interest. This was a mistake; but it is a new point of law. The case, cited from precedents in Chancery, is not, perhaps, decisive, but it goes a great way; and it would be very hard that a party should lose that which he has paid under a mere mistake. I think, in conscience, the defendant ought to refund the premium."

Mr. Justice *Ashbursh*.—"I am clear that there ought not to be a new trial. A policy of insurance ought to be a mere contract of indemnity, and nothing more; but here the money might have been paid twice; which shews decisively that this was a gaming policy."

Mr. Justice *Buller*.—"It is very clear to me that the plaintiffs ought not to recover. There was no fraud on the part of the underwriters, nor any mistake in matter of fact. If the law was mistaken, the rule applies, that *ignorantia juris non excusat*. This was a mere gaming policy, without interest. There is a sound distinction between contracts executed and executory, and if an action is brought with a view to rescind a contract, you must do it while the contract continues executory, and then it can only be done on the terms of restoring the other party to his original situation. There was a case of *Walker v. Chapman*, some years ago in this court, where a sum of money had been paid in order to procure a place in the *Customs*. The place had not been procured, and the party who had paid the money, having brought his action to recover it back; it was held that he should recover, because the contract remained executory. So, if the plaintiffs in the present case had brought their action, before the risk was over, and the voyage finished, they might have had a ground for

for their demand ; but they waited till the risk, such as it was, (not indeed, founded in law, but resting on the honour of the defendant), had been completely run. It makes no difference whether the premium was paid before the voyage or after it." The rule was discharged.

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And very lately it has been held upon the authority of *Lowry v. Bourdieu*, as not being distinguishable from it, that an action for money had and received will not lie to recover back the premium of re-assurance void by the statute of 19 Geo. 2. ch. 37.

Andres v.
Fletcher,
3 Term.
Rep. 266.
See ante,
p. 372.

Lord *Mansfield*, after the rule was discharged in *Lowry v. Bourdieu*, said, he desired it might not be understood, that the court held, that, in all cases where money has been paid on an illegal consideration, it cannot be recovered back. That in cases of oppression, when paid, for instance, to a creditor to induce him to sign a bankrupt's certificate, or upon an usurious contract, it may be recovered, for, in such cases, the parties are not *in pari delicto*.

That the court, in the case of *Lowry v. Bourdieu*, proceeded upon the distinction between contracts executed and executory, is evident, not only from Mr. Justice *Buller's* opinion, but is, in some measure, confirmed by what fell from Lord *Mansfield* upon a subsequent occasion, when this case was cited ; although it must be confessed, that the case about to be quoted, which was only decided suddenly at *nisi prius*, is a good deal shaken by the subsequent decision of *Andres v. Fletcher*.

It was an action brought upon two wagers : one of 26*l.* 5*s.* to 100*l.* the other of 13*l.* 2*s.* 6*d.* to 30*l.* that the colonies of *North America* would be admitted or acknowledged independent states, by some public official act or instrument made or executed, on the part of the king or government of *France*, at some time on or between the 1st of *February* and the 1st of *April* 1778, both days inclusive. The defendant pleaded *non assumpsit*. Upon the opening of this case, Lord *Mansfield* directed the plaintiff to be nonsuited. But the counsel for the plaintiff insisted, that he was entitled to a verdict for the premium on the general count in the declaration, *for money had and received to his use*, which his Lordship permitted on the ground of the contract being void, and of the defendant having money in his hands, which

Wharton v.
De la Rive,
Mich. Vac.
1783, at
Guildhall.

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which he ought not to retain. For the defendant it was said, that he was entitled to keep the premium; and the case of *Louvy v. Bourdieu* was cited; but Lord Mansfield thought it did not apply, as in that case the risk had been run. The point there decided was, that an insurance being made without interest, and the premium paid, the insured shall not recover back the premium, after the ship has arrived safe. And this upon the distinction, that the contract, though not a legal one, *was executed* before the relief was applied for, and no longer *executory*.

Mackenzie
and another
v. Duff,
B. R. Hil-
ary Term
1799.

In a late case, the assured, having been nonsuited at the trial on the ground that the goods insured were prohibited, and that the shipment of them, under the circumstances disclosed, was a violation of the acts of navigation, insisted that they were entitled to a return of premium, and a motion was made to set aside the nonsuit. Had this case proceeded, a decision of the precise question, *whether* the premium is recoverable in cases of insurance effected contrary to the statute law of the realm, without reference to the distinction between contracts *executed* and *executory*, would probably have been obtained: but unfortunately the rule was discharged upon a collateral point, and the main question therefore remained undecided.

Vandyeck
v. Hewitt,
1 East's
Rep. p. 96.
See Potts v.
Bell, ante,
p. 346.

In a very late case, the Court of King's Bench, after a consideration of all the cases, held, that where a premium had been paid on a policy to cover *a trading with the enemy*, though the insurance was void and the underwriters not compellable to pay the loss, it could not be recovered back.

Lord Kenyon, in giving judgment, observed, that it was impossible to distinguish this case from the common one of a smuggling transaction. Where the vendor assists the vendee in running the goods to evade the laws of the country, he cannot recover back the goods themselves, or the value of them. The rule has been settled at all times, that where both parties are *in pari delicto*, which is the case here, *potior est conditio possidentis*.

Morck
and another
v. Abel.
3 Bos. &
Pull. 35.

This point has again come under consideration in two very modern cases, both in the Court of King's Bench and Common Pleas: the decision in the latter court was prior in point of date; but in both of them the doctrine above stated was fully recognized and confirmed. In the first of them, a foreigner having
made

made an insurance upon a *Danish* ship at and from *Bengal* (in which province there are some *Danish* settlements) to *Copenhagen*, and the ship having loaded at *Calcutta*, contrary to the navigation act of 12 Car. 2. ch. 18. s. 1. Lord *Alvanley* and Mr. Justice *Rocke*, and Mr. Justice *Chambre* relied upon the cases of *Andree v. Fletcher*, and *Vandyck v. Hewitt* (ante), and laid down the principle of their decision against the assured's right to recover the premium, as extracted from all the cases, to be, that no man can come into a *British* court of justice to seek the assistance of the law, when he founds his claim upon a contravention of the *British* laws. And a distinction having been attempted at the bar, on the ground of the party interested being a foreigner, it was answered that that could make no difference, as the navigation laws were particularly aimed against foreigners; and that we ought not to relax the rigour of our great political regulations in favour of foreigners offending against them.

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So again in 1806, where an insurance on colonial produce from the *British West Indies* to *Gibraltar* was holden to be void, as a violation of the Acts of Navigation, the Court of King's Bench, consisting of Lord *Ellenborough*, and Judges *Grose*, *Lawrence* and *Le Blanc*, relying on all the above cases, which were quoted from the bar, decided that the premium could not be recovered.

Lubbock
v. Potts,
7 East. 449.

From the various cases upon the subject of return of premium, as well as from all that has already been said, it will appear, that in the *English* law there are two general rules established, which govern almost all cases. The first is, that where the risk has not been run, whether that circumstance was owing to the fault, the pleasure, or will of the insured, or to any other cause, the premium shall be returned. This rule has already been pretty fully discussed. Another rule is, that if the risk has once commenced, there shall be no appointment or return of premium afterwards. Hence in cases of deviation, though the underwriter is discharged from his engagement; yet the risk being once commenced, he is entitled to retain the premium (a).

Cowp. 662;

(a) In the case of *Hogg v. Horner*, (ante, ch. 17.) Lord *Kenyon* being of opinion that there was a deviation, it was insisted that the assured had a right to return of premium; but Lord *Kenyon* thought there was an inception of the risk at, and the contract being entire, there could be no return of premium.

Though

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Though these rules are so plain and simple, that they seem to preclude all possibility of doubt or contention; yet there are few points in the law of insurance, which have given rise to a greater number of clauses than those which relate to the subject of this chapter.

3 Burr.
1240.

It ought, however, to be acknowledged, that less litigation has taken place in those instances where the whole of the premium is either to be retained or restored, than in those where, from the nature of the agreement between the parties, or the nature of the voyage, the contract becomes divisible, and the court can say, "a part of the premium shall be retained for the risk run, and part shall be returned, as the risk has never commenced." This seems to be a refinement upon the rules just established; but it must at the same time be admitted, that *when it can be accomplished*, it is a refinement perfectly consistent with equity and good conscience. The one rule has provided, that if the risk be once begun, there shall be no return: but the other rule has said, and equity has also said, that a man shall not be paid for a risk which he has never incurred: from whence the deduction is easy and natural, that if there are two distinct points of time, or in effect, two voyages either in the contemplation of the parties or by the usage of trade, and only one of the two voyages was made, the premium shall be returned on the other, although both are contained in one policy.

The first time in which this doctrine was considered at any length, was in a case which came before the Court of King's Bench, in the year 1761.

Stevenson v.
Snow.
3 Burr.
1237. and
1 Blac. Rep.
318. S. C.

It was a special case reserved at a trial *at nisi prius*, before Lord Mansfield, in London, upon an action for money had and received to the plaintiff's use, brought by the plaintiff, the insured, against the defendant, the insurer, for a return of part of the premium. It was an insurance upon a ship, at five guineas *per cent.* lost or not lost, *at and from London to Halifax*, in *Neve Scotia*, warranted to depart with convoy from Portsmouth, for the voyage, that is to say, the *Halifax* or *Louisburgh* convoy. Before the ship arrived at Portsmouth the convoy was gone. Notice of this was immediately given by the insured to the underwriter; and at the same time he was also desired either to make the long insurance,

insurance, or to return part of the premium. The jury find that the usual settled premium from *London* to *Portsmouth* is one and a half *per cent.* They also find that it is usual for the underwriter, in such like cases, to return part of the premium; but the *quantum* is uncertain: (And the *quantum* must in its nature be uncertain, because it depends upon uncertain circumstances.) It is stated, that the plaintiff made an offer to the defendant of allowing him to retain one and a half *per cent.* for the risk he had run on such part of the voyage as was performed under the policy, viz. from *London* to *Portsmouth*.

Lord Mansfield.—“ I had not at the trial, nor have now, the least doubt about this question, myself. These contracts are to be taken with great latitude: the strict letter of the contract is not to be so much regarded, as the object and intention of it. Equity implies a condition, “ that the insurer shall not receive the price of running a risk, if he run none.” This is a contract without any consideration, as to the voyage from *Portsmouth* to *Halifax*; for he intended to insure that part of the voyage, as well as the former part of it, and has not. Consequently the insured received no consideration for this proportion of his premium: and then this case is within the general principle of actions for money had and received to the plaintiff’s use. I do not go upon the usage: for the usage found is only that in like cases, it is usual to return a part of the premium, without ascertaining what part. If the risk is not run, though it is by the neglect, or even the fault of the party insuring, yet the insurer shall not retain the premium. It has been objected, that the voyage being begun and part of the risk being already run, the premium cannot be apportioned. But I can see no force in this objection. This is not a contract so entire, that there can be no apportionment; for there are two parts in this contract: and the premium may be divided into two distinct parts, relative, as it were, to two distinct voyages. The practice shews, that it has been usual, in such like cases, to return a part of the premium, though the *quantum* be not ascertained. And indeed, the *quantum* must vary as circumstances vary: so that it never can have been fixed with any precise exactness. But though the *quantum* has not been ascertained; yet the principle is agreeable to the general sense of mankind.”

Mr.

C H A P. XIX. Mr. Justice *Denison*.—"It is most equitable that the defendant should only retain the premium for such part of the voyage, as he has run any risk: the insured has a right to have the other part restored to him. This is agreeable to the general principle of actions for money had and received to the use of the plaintiff: where the defendant has no right to retain, he must refund it."

Mr. Justice *Foster*.—"There is no consideration for the remainder of the premium; for in the voyage from *Portsmouth* to *Halifax*, no risk was run by the insurer, who only insured the voyage *with* convoy: therefore he has no right to retain the premium for this."

Mr. Justice *Wilmot* declared his concurrence most clearly and strongly. "These kinds of contracts," he observed, "are, by the writers on this head, called *contractus innominati*; and the rule, which they lay down concerning them, is, that they are to be determined *secundum bonum et equum*. The jury have here found an usage to return part of the premium in such cases; which is a strong proof of the equity of the thing: and nothing can be more just and reasonable. If the risk was once begun, the insured shall not deviate or return back, and then say, "I will go no further under this contract, but will have my premium returned." But upon this policy there are two distinct points of time, in effect two voyages, which were clearly in the contemplation of the parties; and only one of the two voyages was made; the other not at all entered upon. It was a conditional contract: and the second voyage was not begun; therefore the premium must be returned, for upon this second part of the voyage, the risk never took place at all. This is agreeable to what the writers upon the subject lay down; and is the right and justice of the case." The *poslea* was delivered to the plaintiff (a).

Some years afterwards, the principle established in the foregoing case was attempted to be applied to one, which it did not at all resemble. For the following case was an insurance for

(a) This case was much considered in a case of *Robwell v. Cooke*, 1 Bos. and Pul. Rep. p. 172. in the Common Pleas, but no decisive judgment delivered on the subject.

twelve months at *9l. per cent.*; and because the ship was captured within two months after the contract was made, a return of premium was demanded, upon the principle of *Stephenson v. Snow*. But the contract in this case was entire; the premium was a gross sum stipulated and paid for twelve months; and the parties, when they made the contract, had no intention or thought of a subsequent division, or apportionment.

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The case was thus :

It was an action, in the usual form, for money had and received to the plaintiff's use, for a return of part of the premium. The cause was tried at *Guildhall*, before Lord *Mansfield*, when, by consent, a verdict was found for the plaintiff, subject to the opinion of the court upon the question, Whether, under the circumstances of the case, a proportionable part of the premium ought to be returned or not? If the court should be of opinion that a proportionable part of the premium ought not to be returned, then a nonsuit was to be entered. It now came before the court upon a rule to shew cause, why a nonsuit should not be entered; and the case, as it appeared from the report, was shortly this. The policy was on the ship *Isabella*, at and from *London*, to any port or place, where or whatsoever, for twelve months, from the 19th of *August* 1776, to the 19th of *August* 1777, both days inclusive, at *9l. per cent.* warranted free from captures and seizures by the *Americans*, and the consequences thereof. In all other respects, it was in the common form, against all perils of the sea, &c. The ship sailed from the port of *London*, and was taken by an *American* privateer, about two months afterwards.

Tyrie v.
Fletcher.
Cowp. 666.

Lord *Mansfield*.—"It was very proper to save this case for the opinion of the court, because in all mercantile transactions, certainty is of much more consequence, than which way the point is decided; and more especially so; in the case of policies of insurance: because, if the parties do not chuse to contract according to the established rule, they are at liberty as between themselves to vary it. This case is stript of every authority. There is no case or practice in point; and therefore we must argue from the general principles applicable to all policies of insurance. And I take it, there are two general rules established, applicable

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applicable to this question : the first is, that where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned ; because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and to whatever cause it be owing, if he do not run the risk, the consideration, for which the premium or money was put into his hands, fails, and therefore he ought to return it. Another rule is, that if the risk has *once* commenced, there shall be no apportionment or return of premium afterwards. For though the premium is estimated, and the risk depends upon the nature and length of the voyage ; yet, if it has commenced, though it be only for 24 hours or less, the risk is run ; the contract is for the whole entire risk, and no part of the consideration shall be returned : and yet, it is as easy to apportion for the length of the voyage, as it is for the time. If a ship had been insured to the *East Indies* agreeably to the terms of the policy in this case, and had been taken 24 hours after the risk was begun, by an *American* captor, there is not a colour to say, that there should have been a return of premium. So much then is clear ; and indeed, perfectly agreeable to the ground of determination in the case of *Stevenson v. Snow*. For in that case, the intention of the parties, the nature of the contract, and the consequences of it, *spoke* manifestly *two* insurances, and a *division* between them. The first object of the insurance was from *London* to *Halifax* : but if the ship did not depart from *Portsmouth* with convoy (particularly naming the ship appointed to the convoy), then there was to be no contract from *Portsmouth* to *Halifax* : why then, the parties have said, “ we make a contract from *London* to *Halifax*, but on “ a certain contingency it shall only be a contract from *London* to “ *Portsmouth*.” That contingency not happening, reduced it in fact to a contract from *London* to *Portsmouth* only. The whole argument turned upon that distinction. Mr. *Yates*, who was counsel for the plaintiff, put it strongly upon that head ; and all the judges, in delivering their opinions, lay the stress upon the contract comprising *two* distinct conditions, and considering the voyage as being in fact *two* voyages : and it was the equitable way of considering it ; for, though it was at first consolidated by the parties, there was a defeazance afterwards, though not in words. I think Mr. Justice *Wilmet* put it particularly upon that ground ;

Vide *supra*.

ground; but it was the opinion of the whole court. There was an usage also found by the jury in that case, that it was customary to return a proportionable part of the premium in such like cases, but they could not say *what* part. The court rejected this as a usage for *uncertainty*; but they argued from it, that there being such a custom, plainly shewed the general sense of merchants, as to the propriety of returning a part of the premium in such cases: and there can be no doubt of the reasonableness of the thing. There has been an instance put of a policy where the measure is by time, which seems to me to be very strong, and apposite to the present case; and that is an insurance upon a man's life for twelve months. There can be no doubt but the risk there is constituted by the measure of time, and depends entirely upon it: for the underwriter would demand double the premium for *two* years, that he would take to insure the same life for *one* year only: in such policies there is a general exception against suicide. If the person puts an end to his own life the next day, or a month after, or at any other period within the twelve months, there never was an idea in any man's breast, that part of the premium should be returned. A case of general practice was put by Mr. *Dunning*, where the words of the policy are, "At and from, provided the ship shall sail on or before the first of *August*:" and Mr. *Wallace* considers in that case, that the whole policy would depend upon the ship sailing before the stated day. I do not think so. On the contrary, I think with Mr. *Dunning*, that cannot be. A loss in port *before* the day appointed for the ship's departure, can never be coupled with a contingency after the day: but if a question were to arise about it, as at present advised, I should incline to be of opinion, that it would fall within the reasoning of the determination of *Stevenson v. Snow*: and that there were two parts, or contracts of insurance with distinct conditions. The first is, I insure the ship in port, provided she is lost in port, before the 1st of *August*: and 2dly, if she be not lost in port, I insure her then during her voyage, from the 1st of *August* till she reaches the port specified in the policy. The loss in port must happen, before the risk upon the voyage could commence: and *vice versa*; the risk in port must cease the moment the risk upon the voyage began. Let us see then, what the agreement of the parties is in the present case. They might have insured from two months to two months, or in any less or greater proportion, if they had thought

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proper so to do : but the fact is, that they have made *no division of time at all* ; but the contract entered into is one entire contract from the 19th of *August* 1776, to the 19th of *August* 1777 ; which is the same as if it had been expressly said by the insured, " If you the underwriter will insure me for twelve months, I will give you an *entire* sum ; but I will not have any apportionment." The ship fails, and the underwriter runs the risk for *two* months. No part of the premium then shall be returned. I cannot say, if there had been a recapture before the expiration of the twelve months, that the policy would not have revived."

Mr. Justice *Aston*.—" This case depends upon the words of the policy : and I am of opinion, it is one entire contract at a certain gross sum of *9l. per cent.* for a certain period of time, *viz.* twelve months ; and that no division is to be implied. The determination in *Stevenson v. Snow* went expressly upon this consideration, that there were *two distinct voyages*, and no consideration received by the insured for the premium upon the second voyage : and there certainly was not ; for there never was any point of time, when any risk was run from *Portsmouth*. In *Bond v. Nutt*, the losses insured against were distinct, and unconnected with each other. 1st, A loss of the ship in port, if any should happen there. 2^{dly}, A loss in the passage home, provided she failed on a certain day. The risk in some policies may be distinct and divisible in its nature. In the case of an insurance on a life, the sum is entire, and time is entire for the whole year. So in this case I think the contract is one entire contract : and therefore that there ought to be no return of premium."

Vide ante,
c. 18. p. 432.

Mr. Justice *Willes* and Mr. Justice *Ashturst* were of the same opinion.

Per Curiam. Let a nonsuit be entered.

In a subsequent case, the Court of King's Bench adopted the same rule of decision, where the ship was insured for 12 months, and the risk ceased at the end of two. A distinction was attempted to be made, because in this case, the whole premium 18*l.* was acknowledged to be received from the insured *at the rate of 15 shillings per month* : and this, it was insisted, evidently shewed

shewed the parties intended the risk to continue only from month to month. This objection was, however, over-ruled; the Court being of opinion, that the case last reported decided this; and that the 15s. per month was only a mode of computing the gross sum. The case was in substance as follows:

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It was an action tried before Lord *Loughborough*, at the assizes for the county of *Northumberland*, in which the plaintiff declared, —That the defendant, in consideration that the plaintiff at his request had underwritten several policies of insurance as to certain sums of money therein subscribed against his name, on the ships, merchandizes, and other things therein respectively specified, without receiving the full premiums therein mentioned, undertook and promised to pay the plaintiff so much money, as the premiums therein mentioned to be paid to him amounted to, with an averment that they amounted to 40*l.* There was another count for 40*l.* for money had and received by the defendant to the plaintiff's use. The defendant pleaded non assumpsit as to all except the sum of 3*l.* upon which plea issue was joined; and as to the 3*l.* he pleaded a tender, and paid that sum into court. Upon the plea of tender, issue was also joined. The jury found a verdict for the defendant upon the tender, and for the plaintiff upon the other issue, for the sum of 15*l.* subject to the opinion of the Court, whether he was entitled to recover that sum of 15*l.* or the sum of 3*l.* only, upon a case, which stated, in effect, as follows: The plaintiff had underwritten 200*l.* on a policy effected at *Newcastle* (which was set forth *verbatim* in the case), whereby the ship the *Chollerford* was insured, against capture by the enemy for *twelve months*, in the coasting trade between *Leith* and the *Isle of Wight*, beginning the 13th of *March* 1779, and ending the 13th of the same month, 1780. In the body of the policy it was stated, "That the assurers confessed themselves paid the consideration due unto them by the assured, at and after the rate of 15s. per cent. per month. At the bottom, opposite to the plaintiff's subscription, was written, premium received 16th of *March* 1779;" and on the back was indorsed, "*Newcastle*, 15th of *March* 1779 "Mr. *John Gaul Tomlinson*, on his ship the *Chollerford*, himself master, for *twelve months*, in the coasting trade, at and between *Leith* and the *Isle of Wight*, beginning the 13th of *March* 1779, and ending the 12th of *March* 1780. Enc-

Loraine v.
Thomlin-
son, Dougl.
585.

CHAP. "my only. At 15s. per cent. per month, 18l." The premium
 XIX. was not paid, though expressed in the policy to have been paid, it being the usage in *Newcastle* not to pay the premium at the time of making the insurance; but at various times after the policies are effected, and sometimes, not till twelve months after. The ship was lost in a storm, within the first two of the twelve months for which the insurance was made, and the defendant tendered to the plaintiff 3l. as the premium for two months. The case then states contradictory evidence given by witnesses on both sides, as to what had been done at *Newcastle* in similar cases; but which I forbear to set down; because the Court of King's Bench was afterwards of opinion, that it ought not to have been received.

After the counsel for the defendant had been heard, the plaintiff's counsel was prevented by the Court from proceeding.

Lord Mansfield.—"This is a mere question of construction, on the face of the instrument, and therefore parol evidence should not have been admitted to explain it. It an insurance for twelve months, for one gross sum of 18l. They have calculated this sum to be at the rate of 15s. per month. But what was to be paid down? Not 15s. for the first month, and so from month to month; but 18l. at once. Two cases have been mentioned. *Stevenson v. Snow* was decided on the ground of there being two voyages. *Tyrie v. Fletcher* is directly in point against the defendant. There are two principles in these cases; 1st, If the risk has never begun, the whole premium is to be returned, because there was no consideration: 2d, When the risk has begun, there shall never be a return, although the ship should be taken in 24 hours."

Mr. Justice Ashburst.—"The 15s. per month is only a mode of computing the gross sum."

Mr. Justice Willes, and Mr. Justice Buller concurring in opinion, the *postea* was delivered to the plaintiff.

The two last cases were insurances upon time; but from the principles laid down in them, and in the former case of *Stevenson v. Snow*, it seems perfectly clear, that when the contract is entire

time, whether it be for a specified time, or for a voyage, there shall be no apportionment or return, if the risk has once commenced. And therefore where the premium is entire in a policy on a voyage, where there is no contingency at any period, out or home, upon the happening or not happening of which the risk is to end, nor any usage established upon such voyages; although there be several distinct ports, at which the ship is to stop, yet the voyage is one, and no part of the premium shall be recoverable.

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A rule had been obtained to shew cause why there should not be a new trial in a case, which had come on before Lord Mansfield at Guildhall, when the jury found a verdict for the defendant. The case was this: It was an action on a policy of insurance, on the French ship *Le Pactole*, and her cargo, and the voyage was described in the policy in the following words: "At and from Honfleur to the coast of Angola, during her stay and trade there, at and from thence to her port or ports of discharge in St. Domingo, and at and from St. Domingo back to Honfleur." The clause respecting the premium was as follows: "Slaves valued at 800 livres Tournois per head; the ship at 1450*l*. sterling; other goods, &c. as interest may appear; at a premium of 11 per cent." The ship sailed to Angola, and from thence, after staying some time there, to the West Indies. On her way to Angola, she put in at Cayenne, on the coast of America, and from Cayenne went to Martinico, confessedly out of the way to St. Domingo. In this cause, the first question was a question of fact, not material to our present enquiry, viz. Whether the course taken was a deviation, or not, from the voyage insured? After all the evidence had been heard, the jury thought it was, and accordingly found a verdict for the defendant. Upon their declaring this opinion, the counsel for the plaintiff insisted, that as there was a count in the declaration for money had and received, the voyage insured ought to be considered as composed of three distinct parts or voyages; namely, from Honfleur to Angola; 2dly, from Angola to St. Domingo; and 3dly, from St. Domingo to Honfleur; and that, as the voyage from St. Domingo to Honfleur had never commenced, the premium ought to be apportioned, and a return made of that part which was paid to insure the risk from St. Domingo to Honfleur. Lord Mansfield took the opinion of the jury upon that point also; and

Berm-n v.
Woodbridge,
Doug. 781.

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they were clear there ought to be no return. Next day, however, his Lordship said, he had turned that question in his mind, and that he entertained some doubts upon it, and as it was a question of law, desired Mr. *Lee* to move for a new trial on that ground. It was, however, afterwards moved on both grounds; namely, on the question of fact, whether the deviation was wilful: and 2dly, On the question of law, whether, supposing it wilful, there ought to be a return of premium.—These questions were fully discussed by three advocates on each side; and the Court also took time to deliberate upon them: after which the Lord Chief Justice delivered the unanimous opinion of the whole court.

Lord *Mansfield*, after stating that, upon the question of fact, they were perfectly satisfied with the verdict of the jury, proceeded thus: "If, however, the plaintiff should succeed on the second point, the determination would virtually allow him a new trial on the whole of the cause, because no special case was reserved. But, on the fullest consideration, and after looking into all the cases (though my opinion has fluctuated), we are now all clearly of opinion, that there ought not to be any return. The question depends upon this: Whether the policy contains one entire risk on one voyage, or whether it is to be split into six different risks; for, by splitting the words, and taking "at" and "from" separately, it will make six, viz. 1st, *At Honfleur*; 2d, *From Honfleur to Angola*; 3d, *At Angola*, &c. The principles are clear. Where the risk has never begun, there must be a return of premium; and if the voyages, in this case, are distinct, the risk from *St. Domingo* to *Honfleur* never began. On the other hand, if the risk has once begun, you cannot sever it, and apportion the premium. In an insurance upon a life, with the common exceptions of suicide, and the hands of justice, if the party commit suicide, or is executed in twenty-four hours, there shall be no return. The case is the same if a voyage insured is once begun. Is this one entire risk? The insured and insurers consider the premium as an entire sum for the whole, without division: it is estimated on the whole at 111. per cent. And, which is extremely material, there is no where any contingency, at any period, out or home, mentioned in the policy, which happening or not happening, is to put an end to the insurance. The argument must be, that, if the ship had been taken

taken between *Honfleur* and *Angola*, there must have been a return. By an implied warranty, every ship must be sea-worthy when she first sails on the voyage insured, but she need not continue so throughout the voyage; so that, if this is one entire voyage, if the ship was sea-worthy when she left *Honfleur*, the underwriters would have been liable, though she had not been so at *Angola*, &c.; but according to the construction contended for on behalf of the plaintiff, she must have been sea-worthy, not only at her departure from *Honfleur*, but also when she sailed from *Angola*, and when she sailed from *St. Domingo*. The cases of *Stevenson v. Snow* and *Bond v. Nutt*, were quite different from this. They depended upon this, that there was a contingency specified in the policy, upon the not happening of which the insurance would cease. In *Stevenson v. Snow*, it depended on the contingency of the ship sailing with convoy from *Portsmouth*, whether there should be an insurance from that place. This necessarily divided the risk, and made two voyages. In *Bond v. Nutt*, it was held, that there were two risks, upon the same principle. "*At Jamaica*" was one; the other, viz. the risk "*from Jamaica*," depended on the contingency of the ship having sailed on or before the first of August: that was a condition precedent to the insurance on the voyage from *Jamaica* to *London*. The two cases of *Tyrie v. Fletcher*, and *Lorraine v. Thomlinson*, are very strong, for, if you could apportion the premium in any case, it would be in insurances upon time. Therefore, on very full consideration, we think this one entire risk, one voyage, and that there can be no return of premium." The rule was discharged.

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Vide ante,
c. 12.

Accordingly in another action for return of premium, tried before Mr. Justice *Wiles*, on the northern circuit, where a verdict had been given for the plaintiff, upon a motion to set aside the verdict, and to enter a non-suit, a decision, similar to that of *Bernon v. Woodbridge* was made. The insurance was "*At and from Jamaica to Liverpool, warranted to sail on or before the first of August, premium twenty guineas per cent. to return eight, if she sailed with convoy.*" The ship did not sail till September and was lost. The jury apportioned the premium, and gave the plaintiff a verdict for eight guineas, the defendant having paid eight for the convoy into court, which was allowing four for the risk run by the defendant at *Jamaica*.

MAY V.
Gregson,
N. B. East.
24 Geo. III.

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Lord *Mansfield* —“ It would be endless to go into enquiries about the risk at *Jamaica*. It appears on the evidence to be different on different sides of the island. Besides the parties have divided the risk, with respect to convoy; for it is a premium of twenty guineas, to return eight, if the sail with convoy: but there is an absolute warranty as to the sailing, and nothing said of the premium.”

Mr. Justice *Willes* thought the premium should be apportioned.

Mr. Justice *Abbott* and Mr. Justice *Buller*, agreed with Lord *Mansfield*, the latter observing, that as the parties have not considered it as two risks, nor estimated the risk at *Jamaica*, the court cannot do it for them. In all the insurances from *Jamaica*, the policy runs “ at and from,” and though in many instances the voyage has not begun, yet there never was an idea of the premium being returned, and that no usage was found by the jury. The rule for entering the judgment of nonsuit was made absolute.

Vide supra.

I am aware that the decision in this case may seem to clash with what fell from Lord *Mansfield*, in delivering his opinion in the case of *Tyrie v. Fletcher*; in which he put a supposed case of an insurance “ at and from, *provided* the ship shall sail on or before the first of *August*.” In such a case, his Lordship observed, *as then advised*, he should incline to think it a divisible risk. In this place, it would be sufficient to observe, in answer to such an objection, that the opinion then delivered by Lord *Mansfield* was a mere *obiter dictum* upon a point, arising only in the course of argument; in which case the greatest abilities are liable to mistake. But his Lordship delivered that opinion, with a wise and prudent reservation, that, *as at present advised*, he thought so and so: and it reflects no discredit upon any man, however renowned for knowledge, to alter an opinion, upon mature deliberation. There is, however, one very obvious distinction, upon which the Court relied much, between *Meyer v. Gregson*, and the case put in *Tyrie v. Fletcher*: for in the latter, the insured has used a most significant word (*provided*) to mark the difference between the two parts of the risk; *at and from, provided the sail, &c.* In the former, the insured has expressly provided for
a return

a return of premium, in case the ship sails with convoy; Why did he not use the same precaution, lest she should not sail by the day limited? Having done it in the one case, it is to be presumed he did not mean to do it, or that the insurer would not consent that it should be done, in the other: and as the parties had not divided the risk themselves, the court could not do it for them.

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In another case upon an insurance "at and from any port or ports in *Jamaica* to *London*, following and commencing on her first arrival there, warranted to sail with convoy from the place of rendezvous to *Great Britain*," the same questions were again agitated. But as the counsel differed upon the evidence given at the trial, the main question was not fully discussed by the court, but was sent back to a new trial.

Gale v.
Machell,
B. R. E. R.
25 Geo. III.

The last case upon this subject was also an action for a return of the premium. The policy was "at and from *Jamaica* to *London*, warranted to depart with convoy for the voyage, and to sail on or before the 1st of *August*, upon goods on board a ship called the *Jamaica*, at a premium of 12. guineas *per cent*." The ship sailed from *Jamaica* to *London* on the 31st of *July* 1782, but without any convoy for the voyage. At the trial before Lord *Mansfield*, the jury found a verdict for the plaintiff, subject to the opinion of the court upon a case, stating the facts already mentioned. In addition to which, they *expressly* find, that it is "the constant and invariable usage in an insurance, at and from *Jamaica* to *London*, warranted to depart with convoy, or to sail on or before the 1st of *August*, when the ship does not depart with convoy, or sails after the 1st of *August*, to return the premium, deducting one half *per cent*."

Long v.
Allen, B. R.
E. R. Term,
25 Geo. III.

Lord *Mansfield*.—"An insurance being on goods warranted to depart with convoy, the ship sails without convoy; and an action is brought to recover the premium. The law is clear, that if the risk be commenced, there shall be no return. Hence questions arise of distinct risks insured by one policy or instrument. My opinion has been to divide the risks. I am aware that there are great difficulties in the way of apportionments, and therefore the court has sometimes leaned against them. But where an express usage is found by the jury, the difficulty is cured. They offered to prove the same usage as to the *West*

Vide Meyer
v. Gregoire

Indies

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Mr. Justice *Willes*, and Mr. Justice *Ashbursh*, concurred with his Lordship.

Mr. Justice *Buller*.—"The counsel for the defendant did right in his argument to make the chief question, Whether parol evidence of this usage ought to have been received? In mercantile cases from Lord *Holt's* time, and in policies of insurance in particular, a great latitude of construction as to usage has been admitted. By usage, places come within the policy, which are not expressed in words; usage explains and even controuls the policy. The usage here found by the jury is universal: and though in some cases one half *per cent.* may be a small premium for the risk at; yet the underwriters are aware that it is so. In *Meyer v. Gregson*, no usage was found. Besides in cases of this kind, where every thing is left to the whim and caprice of a jury, I lean much against them. Here a general and certain usage is found; and no inconvenience can result from it." The *possession* was delivered to the plaintiff.

From the tenor of all these cases it should seem, as Lord *Mansfield* said in the case of *Long v. Allen*, that so many difficulties occur in apportioning the premium, that the courts are often obliged to decide against it, unless there be some usage upon the subject. Even in the case of *Stevenson v. Snow*, the jury found that it had been usual to divide the risk; and although the court rejected the usage for uncertainty, because it did not ascertain what proportion of the premium should be returned; yet they expressly say, that it serves to shew what the idea of the mercantile world is upon the subject. If, indeed, we look back to all the cases reported in this chapter, we never find an apportionment take place, except in *Stevenson v. Snow*, and *Long v. Allen*, on account of the difficulty, unless there be some usage, as in those cases, to guide and direct the judgment of the court: and of late years one has known no instance of an apportionment occur.

Vide ante,
c. 18.

Before this chapter is concluded, it will be proper to observe, that in the case of *Bond v. Nutt*, which was so often mentioned in the argument of the cases upon apportionment, the question

never

never arose. In that case, the two material questions were, as may be seen by a reference to it in the two preceding chapters of this work, whether the ship had complied with a warranty of sailing by a particular day: and whether in going to the place of rendezvous for convoy, she was guilty of a wilful deviation. It was proper to mention this, to prevent misconception; and it was also taken notice of by Mr. Justice *Buller*, in the case of *Long v. Allen*.

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CHAPTER THE TWENTIETH.

Of the Proceedings upon Policies of Insurance.

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XX.Vide the In-
troduction.

IN the present chapter, it is intended to point out in what manner, and by what form of legal proceeding, a man, who has insured property, and has sustained a loss, is to recover against the underwriters upon the policy. We have formerly seen, that the Court of Policies of Insurance fell into disuse, and the reasons why it did so : since which period all questions of this nature have been decided by the usual mode of trial, known to the laws and constitution of this country, namely, the trial by jury in the courts of common law. Cases of this nature are not the subject of enquiry even in a court of Equity, because the demand is plainly a demand at law ; and the loss and damage sustained are as much the object of proof by witnesses, as any other species of damage whatever. This was decided by a decree of Lord Chancellor *King*, whose opinion was afterwards confirmed by the House of Lords.

De Ghetoff
and others
v. the Ge-
ve nor and
Company of
the London
Assurance,
3 Brown's
Pa l. Cases,
525.

In the year 1720, some merchants at *Ostend* set up a trade to the *East Indies* ; and amongst others, one *James Maelcamp* equipped a ship, called the *Flandria*, for a voyage to *China*, wherein several persons were concerned. *Maelcamp* had the care and direction of the ship, and gave receipts to the several persons concerned, for the monies they paid, promising to be accountable to them for their respective proportions of the net profit of the voyage. These transactions being carried on mostly at *Ostend* or *Antwerp*, the several persons, who had a mind to be concerned in the undertaking, gave directions to their correspondents at those places, to pay *Maelcamp* what sums they thought fit, and to take his receipts for the same. The Appellants gave directions to one *Conninck* to pay several large sums to *Maelcamp*, on account of the said undertaking ; and accordingly *Conninck* paid him divers sums, amounting to 35,000 guilders, and took distinct receipts for the same, according to the proportion

tion for which the appellants were concerned therein: he also, by the order and direction of the appellants, and for their use or benefit, agreed with the respondents to insure on the said ship the *Flandria*, 500*l.* and by a policy, dated the 26th day of *December*, 1720, this insurance was effected, at a premium of 12*l. per cent.* The ship sailed from *Ostend*, in order to proceed to *China*; but on her way was seized at *Bencoolen*, in the *East Indies*, by the governor, being an *English* settlement, and the ship and cargo were confiscated. The appellants, upon notice of this event, applied to the respondents for payment of the 5000*l.* insured, and produced to them the several receipts for their respective interests in the ship, and affidavits affirming the several sums therein mentioned, to have been really and *bonâ fide* paid. But the respondents refusing to pay, or make any satisfaction to the appellants, they brought their bill in the Court of Chancery, against the respondents, and the said *Conninck*, praying, that the respondents might be decreed to pay the appellants the said sum of 5000*l.* with interest, according to their several and respective shares and proportions thereof. To this bill, the respondents put in a demurrer and answer, and to such part of the bill, as sought to compel them to pay the appellants the 5000*l.* or to make them any satisfaction for any loss, which had happened to the ship, they demurred; and for cause of demurrer shewed, that if the policy of insurance in the bill mentioned was forfeited, a proper action at law lay to recover the money due thereupon; and that the appellants, if they were entitled to such relief as they prayed by their bill, might have their complete and adequate remedy by an action at law, where such matters were properly cognizable, and where the appellants ought to prove their interest in, and the loss of the ship. The demurrer came on to be argued before Lord Chancellor King, when his lordship ordered it to stand over for two months till *Conninck's* answer should come in; and if the appellants did not procure such answer in two months, the demurrer was to be allowed. *Conninck* accordingly put in his answer within two months, and thereby admitted, that he made the assurance in his own name, in trust and for the benefit of the appellants; but said he did not care to permit the appellants to bring any action against the respondents in his name; he being advised, that if any such action should be brought and they should not prevail therein, he would be personally liable to pay all the costs and charges occasioned in consequence thereof. In support
of

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of the demurrer it was urged, that the appellants' demand was plainly a demand at law, as they had nothing to prove but their interest, and the loss of the ship, which were facts proper to be tried by a jury. That there was no equity suggested by the bill, but a pretended difficulty to produce witnesses: and that their trustee refused to permit them to bring an action in his name: that the former objection might with equal reason be suggested in almost every case of a policy of insurance; and the latter appeared manifestly to be thrown into the bill, merely to change the jurisdiction, and it was in a great measure falsified by the trustee's answer, for he did not say that he ever refused, but only that *he did not care to permit his name to be made use of*. If bills of this kind were encouraged, it would be easy to bring all sorts of property to be tried in a court of Equity.

Upon these reasons, Lord *King* allowed the demurrer; and upon an appeal to the House of Lords, after hearing counsel upon it, it was ordered and adjudged, that the same should be dismissed; and the order complained of, affirmed.

There may, it is true, be cases, where an application to a court of Equity on the part of the insured, is strictly proper, and will be entertained. For instance, if the trustee in a policy of insurance do actually refuse his name to the *cestui que trust* in an action at law, there may be some pretence for going into a court of Equity, as Lord *Hardwicke* has once observed. Or, if from a concurrence of circumstances, the persons, whose testimony is requisite to the decision of some disputed facts, reside abroad, the Court of Chancery will grant a commission to examine those witnesses. But it is not upon a mere general trust, or the loose suggestions of any of these facts, that this extraordinary interposition will take place.

Chitty v. Selwin and Martin,
3 Atk. 359.

There are also cases, in which the insurers may go into equity, to obtain injunctions to stay the proceedings against them at law: as in the last case mentioned, where the evidence of persons, abroad is requisite for their defence; in which situation, they shall have a commission to examine witnesses abroad, and an injunction to stay proceedings at law in the mean time. Another ground for an application to a court of Equity, is a suspicion of fraud on the part of the insured, and of which I fear the chapter on

on fraud produces too many instances: in such cases the court will compel the party charged to make a full disclosure upon oath of all the circumstances that are within his knowledge; and to deliver up all papers and documents, that are at all material to the question. But except in these instances, all issues upon policies of insurance must be tried in the courts of common law. Even if the parties, by a clause in the policy, agree that in case of a dispute, it shall be referred to arbitration, that will not be a sufficient bar to an action at law; provided no reference has been in fact made, nor is depending.

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Vide c. 10.

Thus in an action upon a policy of insurance it appeared, that a clause was inserted, that in case of any loss or dispute about the policy, it should be referred to arbitration: and the plaintiff averred in his declaration, that there had been no reference. Upon the trial at *Guildhall*, the point was reserved for the consideration of the court, whether this action would lie before a reference had been made; and it was held by the whole court, that if there had been a reference depending, or made and determined, it might have been a bar; but the agreement of the parties cannot oust this court; and as no reference has been, nor any is depending, the action is well brought, and the plaintiff must have judgment.

Kill v. Hollister, 1 Will. 129. In *Thompson v. Charneck*, 8 Term Rep. 139. it was held that a covenant in a deed to refer all matters is not sufficient to oust the courts of law and equity of their jurisdiction.

Having thus seen in what courts the party injured in the contract of insurance is to seek for redress, let us now consider, by what form of action that redress is to be obtained. The act of parliament, by which the two Insurance Companies were erected, ordered, that they should have a common seal, by affixing which, all corporate bodies ratify and confirm their contracts. Hence a policy of insurance made by the *Royal Exchange Assurance Company*, or the *London Assurance Company*, is a contract under seal; and if the contract is broken, the proceedings against these Companies must be by action of debt or covenant. From this circumstance a great inconvenience arose; for under the plea of the general issue to an action of debt or covenant, the true merits of the case could seldom come in question: but in order to bring them forward, it became necessary to plead specially. This was attended with such a heavy expence, such great delays, and frequent applications to courts of equity for relief, that the legislature at last interposed, and enacted, "that in all actions of

6 Geo. I.
c. 18.

11 Geo. I.
c. 30. s. 43.

debt

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“ *debt* to be sued or commenced against either of the said corporations, upon any policies of insurance under the common seal of such corporations, for the assuring of any ship or ships goods or merchandizes at sea, or going to sea, it should and might be lawful to and for the said corporations, in such action or suit, to *plead generally, that they owed nothing* to the plaintiff or plaintiffs in such suit or action; and that in all *actions of covenant*, which should be sued or commenced against either of the said corporations upon any such policy of assurance under the common seal of such corporation for the assuring of any ship or ships, goods or merchandizes, at sea or going to sea, it should and might be lawful for the said respective corporations, in such action or suit, to *plead generally, that they had not broke the covenants*, in such policy contained, or any of them; and if thereupon issue should be joined, it should and might be lawful for the jury, if they should see cause, upon the trial of such issue, to find a verdict for the plaintiff or plaintiffs in such suit or action, and to give so much, or such part only of the sum demanded, if it be an action of debt, or so much in damages, if it be an action of covenant, as it should appear to them, upon the evidence given upon such trial, such plaintiff or plaintiffs ought in justice to have.”

36 Geo. III.
c. 26.

In a subsequent act of parliament the following clause is inserted, “ that if any action or suit shall be commenced, brought, or prosecuted against the corporation of the *Royal Exchange* assurance of houses and goods from fire, by any person or persons, bodies politick or corporate, for or concerning any assurance or assurances by the said recited charter, or hereby authorised to be made, or relating to the powers hereby granted, or concerning any other matter or thing herein or in the said charter above recited contained, the said corporation and their successors may in such action or suit plead the general issue, and give the special matter in evidence.”

The charter recited in the act is that, which enabled the company to make insurances for lives and against fire; and therefore it should seem (a similar act having passed respecting the *London Assurance Company*) that in insurances on lives, and insurances against fire, both these companies may plead the general issue, as they might by virtue of the statute 11 Geo. I. in cases of marine insurances.

Since

Since the three first editions of this work were published, an act of parliament passed, enabling his majesty to incorporate, by charter, a company to be called, *The Globe Insurance Company*, which charter shall empower them to make insurances upon lives; or on houses, warchouses, goods, ships, vessels, barges and other craft, with their cargoes, in port, or used on navigable canals, farming stock, and all other property, against loss or damage by fire, within *Great Britain* or *Ireland*, and any other parts abroad, within his majesty's dominions or not; and for other purposes hereafter to be mentioned in their proper place. I only allude to this new corporation at present, for the purpose of stating, that by the 9th section of the act of incorporation above quoted, the same pleas, and the same power to the jury to assess the damages which shall actually appear to be due, are given, in the case of *The Globe Insurance Company*, as were given to the *Royal Exchange* and *London Assurance Companies* by the acts lately recited. Thus it stands with respect to the corporations.

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39 Geo. III.
c. 83
Sect. 2.

Wherever the contract of insurance is entered into with a private underwriter, it is done by the insurer merely subscribing his name to the instrument, which is no more than what is called by the lawyers a simple contract; the remedy for a breach of which is by an action of *assumpsit*, or an action upon the case founded upon the *promise* and undertaking of the insurer. There are, however, it is to be observed, two kinds of actions of *assumpsit*: the one, what is denominated a general *indebitatus assumpsit*, in which the plaintiff states generally, that the defendant, *being indebted* to him in so much money for goods sold, &c. or for money lent to the defendant, or for money had and received to the use of the plaintiff, in consideration thereof, *undertook and promised* to pay the amount; the other is called a *special assumpsit*, which must always be founded on some particular or special agreement. The former can never be used as the means to recover upon a policy of insurance. The only cases, in which it can be at all used with respect to this contract are, where money has been paid by mistake to the insured by the insurer, upon the supposition of a loss, when in fact there was none; a rule which holds, whether the money was paid through the fraud or mistake of the receiver: or where the insured wishes to recover back the premium which he has paid to the insurer. In these cases, the proper mode is to bring an action of *indebitatus assumpsit* for money

3 Black 4.
Com. 157.

1 Salk. 22.
Skinner,
412.

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ney had and received to the plaintiff's use: and therefore in almost all actions upon policies of insurance, it is usual after the count for the special *assumpsit*, to add one or two general counts; that if the policy should be set aside, and the contract declared void, the insured may at least be enabled to recover the premium.

Vide ante,
c. I. p. 33.

It being thus evident, that the proper form of action, in order to recover upon a policy of insurance, is a special *assumpsit*, founded upon the express contract of the person who signs it; it will follow as an immediate consequence, that the first thing which is necessary for the plaintiff to insert in his declaration, or state of the case, will be the policy itself, because that is the foundation of the whole. He should also state, that it was signed by the defendant. The next averment will be, that in consideration of the premium being paid, the defendant had undertaken to indemnify against the losses specified in the policy. We saw in the first chapter of this book, that the premium was the consideration upon which the whole contract rested; and that by the custom, the receipt of the premium was acknowledged in the body of the policy. It is then necessary for the plaintiff to allege that goods and merchandizes were laden on board to the amount of the sum insured, and that the plaintiff was interested therein; or if the insurance be upon the ship, the insured's interest must, in the same manner, be averred (a). The next material averment is, that the property insured was lost, and by what means that loss happened; in stating which, the plaintiff must bring it within one of the perils insured against by the policy: but he must always state it according to the truth. Thus he ought to shew, that it was by perils of the sea, by capture, by fire, by detention, by barratry, or any of the other perils mentioned in the policy.

Knight v.
Cambridge,
2 Ld. Raym.
1349.
3 Stra. 581.

Where the loss had been by *barratry*, the breach was thus assigned, the proceedings being at that time in *Latin*, *per frau-*

(a) In *Nantes v. Thompson*, 2 East's Rep. 385. the Court of King's Bench unanimously decided, after time taken to deliberate, and after two arguments at the bar, that a declaration on a policy of insurance need not aver any interest in the assured, though there be no such words as "interest or no interest" in the policy. This case has been removed by writ of error into the Exchequer Chamber; but though it has been twice argued, no judgment has as yet been pronounced, 1809.

dem et negligentiam magistri navis depressa et submersa fuit, et totaliter perdit et amissa fuit, and it was insisted that this was not within the meaning of the word *barratry*, but the breach should have been express, that the ship was lost by the *barratry* of the master.

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The Court were unanimously of opinion, that there was no occasion to aver the fact in the very words of the policy; but if the fact alleged came within the meaning of the words in the policy, it was sufficient. *Barratry* imports fraud, and he that commits fraud, may properly be said to be guilty of a neglect, namely, a breach of duty.

It is true that the practice at present, as I have reason to believe from precedents which I have seen settled by the ablest special pleaders, is to aver such a loss to have happened "by the *barratry* of the master or mariners."

If the plaintiff in his declaration allege, that a total loss has happened; and lay the damages as for a total loss, it shall be no bar to his recovery, though he can only prove a partial loss; for in an action for damages merely, a man may always recover *less*, but never *more* than the sum he has laid in his declaration. A contrary doctrine was once attempted to be maintained; but was unanimously over-ruled.

See the statutes just quoted as to the corporations, upon this point.

The case, in which it was so determined, came before the Court upon a question reserved by Lord Mansfield at *Nisi Prius* at *Guildhall*, upon an action on the case, on a policy of insurance. The insurance was made upon one-fourth part of the ship *Encouragement*, and of its cargo, from *Greenland* to *London*, free from average under a certain value, from the ice. The plaintiff declared upon a total loss of the ship; the declaration expressly stated a total loss of it; and the damages were laid for a total loss. But the evidence only proved an average or partial loss; it was not attempted to prove a total one; and it was only shewn that the ship had received some damage, which little more than 50*l.* would have repaired. The defendant's counsel objected at the trial, "that this evidence did not support the plaintiff's declaration." They also represented the practice to have been on their side; namely, that proof of a partial loss was not sufficient

Gardiner v.
Crosfield,
2 Burr. 904.
1 Blac. Rep.
198.

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to maintain a declaration for a total loss. A verdict was taken for 20*l.* as for an average loss : but it was agreed on both sides that the verdict should be subject to the opinion of the Court, " Whether it was maintainable in point of law." If the Court should be of opinion that it was, the verdict was to stand ; but if the Court should be of a contrary opinion, the plaintiff was to have a judgment of nonsuit against him.

Lord Mansfield.—" At the trial it appeared to me, and so the jury thought, that the present case could *not* be considered as a *total* loss. The defendant's counsel objected, as they do now, that the jury could not take a partial loss into their consideration, upon an express declaration for a total loss : and I understood from them, that the practice supported their objection. Mr. Norton, who was counsel for the plaintiff at the trial, then argued to the contrary upon principles : and he also cited the case of *Walker v. the Royal Exchange Assurance Company*. But that case does not prove much ; for that was a total loss. I was satisfied upon the principles, provided the practice did not interfere with them, which I was then told it did. I chose to put it in such a shape, that the opinion of the Court might be had without delay or expence. No hardship was done to the defendant upon the *quantum* of the damages found : for the plaintiff took a great deal *less* than it clearly appeared on the evidence that the loss amounted to. I cannot hear of any such determination as can support the objection that has been made by the defendant's counsel. Therefore it stands singly upon principles. And upon principles it is extremely clear, that the plaintiff may, upon this declaration, recover damages for a *partial* loss. This is an action upon the case, which is a liberal action ; and a plaintiff may recover *less* than the grounds of his declaration support, though *not more*. This is agreeable to justice, and consistent with his demand. Here are two grounds of the plaintiff's declaration ; namely, the policy, and the damage to the ship. As to its being a total or a partial loss, that is a question more applicable to the *quantum* of the damages, than to the ground of the action. The ground of the action is the same, whether the loss be partial or total ; both are perils within the policy. As to the defendant's not coming prepared to defend a partial loss : this indeed would be an objection if it were true. But the defendant does in truth come prepared to shew, that either no damages had happened

happened at all; or at least, that damages have not happened to such a degree as the plaintiff has alleged in his declaration; or, that he did not sign the policy. As to the effects of a judgment by default, the defendant could not have been hurt by a judgment by default. For the plaintiff could not have recovered, even upon a writ of enquiry, any greater damages than he could prove to the jury sworn to assess them, that he had actually suffered. If the present objection were to prevail, it would introduce the addition of unnecessary counts in declarations, and an enormous swelling of the records of the court. It is more convenient to lay the case short, than prolix. There is no proof of any practice contrary to the principles. It was the apprehension of such contrary practice, that was the only occasion of my having any doubt at the trial. I am now fully satisfied, that the plaintiff may recover either the *whole* or *less* than he has laid; and therefore this verdict ought, in my opinion, to stand. In an ejectment for more, the plaintiff may recover less: it is every day's practice."

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Mr. Justice *Denison* concurred, and thought it a very plain case. It is an action for *damages* for the loss of the ship. Now, in an action for damages, the plaintiff is to recover his damages according to his proof, *pro tanto*; but he is not, in an action for damages, obliged to prove all that he has alleged. If it had been an action of covenant for pulling down a house, would not the plaintiff be entitled to recover damages for pulling down *half* the house, provided he had proved that the defendant did it? This is no variance of the evidence from the declaration; the evidence tends, in a certain degree, to the proof of what is alleged in the declaration; it is not necessary to lay two counts in such a declaration as this.

Mr. Justice *Foster* was of the same opinion.

Mr. Justice *Wilmot*.—"In actions for damages, the plaintiff may recover all, or for any part: the damages are severable, and may be given *PRO TANTO*. Here damages are laid for a *total* loss, which is only the measure of the damages: and the plaintiff proves a *partial* loss; which only affects the measure of the damages, but is no variance from the allegations contained in the declaration. If this had been a judgment by default, yet the

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plaintiff could not, even in that case, have recovered damages for *any more* loss than he was able to prove under the writ of enquiry of damages. And as to the defendant's not having sufficient notice that he should come prepared to defend against a partial loss, I think he had sufficient notice to come thus prepared: for he ought to come prepared to prove, "that no damage at all happened." If *any* at all happened, he will be liable *pro tanto*, if it be proved."

The *poslea* was delivered to the plaintiff.

Page v. Frv.
2 Bos. & Pu l.
440.

In a declaration on a policy, the plaintiff, who was an agent, averred in his declaration, that Mess. *Hyde* and *Hobbs* were at the time of loading, at the time of subscribing the policy, and until the time of the loss, interested in the commodity insured to a large amount, viz. to the amount of all the money ever insured thereon; and that the policy was made for their use, risk, and benefit. It appeared in evidence that, *prior to the policy*, *Hyde* and *Hobbs* had permitted another mercantile house to take a joint concern in the corn: and it was objected that the fact so proved was in direct contradiction to the averment in the declaration.

But Lord *Eldon*, *Heath*, *Rooke* and *Chambre*, Justices, were of opinion, that there was a sufficient interest throughout the entirety of this cargo, notwithstanding other persons had a beneficial interest in a part, to support the averment in the declaration; and that the spirit of the act of the 19 Geo. 2. only requires that the policy shall not be a gaming policy (a).

An attempt was also once made to nonsuit a plaintiff, because the declaration alleged that he had a smaller interest than he appeared in proof to have. But this attempt also failed.

Page v. Rogers, Sitt. at Guildhall, Hil. Vac. 1785.

It was an action on a policy of insurance, in which the declaration stated, that the plaintiff was possessed of one third of the

(a) Since this decision, and since the former edition, I have found a MS. case of *Hiscox v. Bartlett*, at Guildhall, December 1747, in which Lord Chief Justice *Lee* held accordingly. MSS. *per me*. And see also *Perchard v. Whitmore*, 2 Bos. & Pull. 155, note. Where *Buller* Justice held, that if *A.* and *B.* declare upon a policy, and aver the interest in themselves, it is not a fatal variance, though it shall appear that *C.* became interested after the policy effected, and before the action was brought.

ship on which the insurance was made. It was proved that the plaintiff had purchased the whole ship at one period; and as there was no evidence to shew that he had since parted with any share of it, the counsel for the defendant insisted, that the plaintiff had not proved his declaration, which alleged him to have but one third.

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Lord Mansfield over-ruled the objection, saying, that this was *prima facie* sufficient evidence; for *omne majus continet in se minus* (a).

We have seen that policies of insurance are seldom effected by the party himself really interested, but generally by the intervention of a broker employed by the insured, who transacts the business with the underwriters as attorney for his principal, from whom he receives his instructions, and from which, if he deviate, he is answerable to his employer in an action on the case; like any other person who undertakes any office, employment, trust, or duty, and who thereby impliedly undertakes to perform it with integrity, diligence, and skill (b). It is also common for the broker to open the policy in his own name, at the same time declaring for whose use, benefit, or interest, the same is made; how far such declaration is necessary we have formerly explained. As the policy may be made in the name of the broker, so also may the action be brought in his name, as was done in the case

3 B'ackst.
Com. 168.

25 Geo. III.
c. 44.
Vide ante,
c. 1. p. 18.
and see also
28 Geo. III.
c. 56. ante,
p. 19.
1 Burr. 490.
Vide ante,
c. 15.

(a) But if the plaintiff in this case had the whole ship, it seems that he could never bring another action for the other two thirds; because that would be a splitting of actions.

(b) As the brokers transact the chief part of the business, and generally pay the premiums, the law has given them a lien upon the policies in their hands, so as to enable them to deduct out of any monies they may receive for the assured, not only the premium and commission due on the particular policies, but the general balance due to them on the account between them and their principals. And it has also been decided, that if a broker should part with the possession of the policy, so as to lose his lien upon, it; yet if it get back into his hands for any purpose whatever, the lien revives. These points were settled in the case of *Whitbread v. Vaughan*, Trin. 25 Geo. 3. in B. R. and of *Parker and others v. Carter*, in C. P. Trinity 1788: both of which cases are stated at length in Mr. Coke's book on the Bankrupt Laws, 4th Edit. p. 579. But if the policy was effected by an agent in his own name, he being an *Englishman*, telling the broker, that the property was *neutral*, and to warrant it to be so, this was held to be a sufficient notification to the broker that the party acted only as *agent*, and therefore in an action by the foreign principal against the broker, he can only set off the money due for the particular premium, and not the general balance due from the *English* agent to him. *Masante v. Henderson*, 1 East's R. 335.

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 XX. *riety of other cases.*

As this contract depends so much upon the purest good faith, and the most liberal communication of circumstances, relative to each particular case; when gaming insurances, without interest, were abolished by the legislature, in order effectually to answer the purpose intended, it became necessary to order that a disclosure of all insurances, effected on the same property, should be made even after an action brought.

19 Geo. II. Thus it was declared, "That in all actions or suits brought
 c. 37. l. 6. " or commenced by the assured, upon any policy of assurance,
 " the plaintiff in such action, or suit, or his attorney or agent,
 " should, within fifteen days after he or they should be required
 " so to do in writing by the defendant, or his attorney or agent,
 " declare what sum or sums he had assured, or caused to be as-
 " sured in the whole, and what sums he had borrowed at re-
 " spondentia or bottomry, for the voyage in question in such suit
 " or action."

In addition to this very wise provision, it having appeared to the legislature, that some vexatious persons, notwithstanding the perfect willingness of the insurers to pay losses, to which they were liable, still persevered in bringing actions, by which the defendants were put to great and heavy charges, and had no means of paying the money into court; it was therefore enacted,

19 Geo. II. "That it should and might be lawful for any person or persons,
 c. 37. l. 7. " body or bodies corporate, sued in any action or actions of
 " debt, covenant, or any other action or actions, on any policy
 " or policies of insurance, to bring into court any sum or sums of
 " money; and that if any such plaintiff or plaintiffs should refuse
 " to accept such sum or sums of money so brought into court as
 " aforesaid, with costs to be taxed, in full discharge of such
 " action or actions, and should afterwards proceed to trial in
 " such action or actions; and the jury should not assess damages
 " to such plaintiff or plaintiffs, exceeding the sum or sums of
 " money so brought into court, such plaintiff or plaintiffs, in
 " every such case and cases should pay to such defendant or de-
 " fendants, in every such action or actions, costs to be taxed;
 " any law, custom, or usage, to the contrary notwithstanding."

These

These preliminary steps being taken, the defendant is to put in his plea to the charge or declaration of the plaintiff; which, by the act of parliament, is prescribed to the Assurance Companies, when they are defendants; namely, that they owe nothing, if the action be debt: or if it be covenant, that they have not broken the covenants, which they had undertaken to keep. But in the case of a private insurer, as the action is merely an *assumpsit*; so the answer to it is *non assumpsit*; that is, the defendant has not promised as the plaintiff has alleged. Under this plea, the defendant will have a right to take advantage of all those circumstances, which, as we have seen, will either render the policy void, or make it of no effect: such as fraud, want of interest, not being sea-worthy, deviation, non-performance of warranties, and all other grounds stated in former chapters.

Issue being thus joined between the parties the next object for our consideration is the proof, which it will be necessary for the plaintiff to produce, in order to support his case. This enquiry will be rendered very easy, by reflecting upon those allegations, which, as we have before shown, it is incumbent upon the plaintiff to insert in his declaration. We have seen, that the policy must be set out in the declaration; and consequently the first evidence to be given, is, that the defendant's hand-writing is subscribed to the policy (a). This, in the liberality of modern practice, is seldom required to be done; as the subscription is usually admitted; but in strictness, it may be insisted on: and in a work of this nature, it is my business to point out every thing, which

(a) It is now frequently the practice to subscribe policies by an agent of the underwriter: and therefore where that is the case, in strictness, the authority of the agent ought to be proved. This in fact is *seldom* insisted upon, the parties in general, when they defend a cause of this nature, intending to try some real or supposed question, either of law or fact. But experience in Courts of Justice informs us that such distances are sometimes made. So a few years ago an action was brought upon a policy, in which the policy was subscribed by one *Hutchins*, for the defendant. The witness said he did not know by what authority, but that *Hutchins* was in the constant habit of subscribing policies for the defendant, and had done several for the witness, and for others, to his knowledge. It was objected that *Hutchins* might have done this by some limited power of attorney; which ought therefore to be produced. But Lord *Kenyon* overruled the objection, being of opinion that the acts of *Hutchins* held him out to the world as properly authorized, and his having subscribed several policies was sufficient to charge the defendant, who, and not the plaintiff, ought to prove his authority, to be limited. *Noble v. Erving*, 1 *Elph. R.* 61.

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Vide ante,
2.

either party is expected, or compellable to perform. When the signature is once proved, the Court and jury are in possession of the extent of the contract (except as it may be further extended by *usage*), the conditions to be performed on either side; and all the other circumstances relative to the risk insured. And although in the course of our enquiries, we have seen frequent instances where the usage and practice of a particular trade controul and extend the written words of a policy; yet in no case shall evidence of any agreement be allowed, which directly tends to contradict the policy; for to suffer them to be defeated by agreements by parol, not appearing, would be greatly to diminish their credit, and to render them of no value.

Kaines v.
Knightly,
Skinner, 54.

Thus in an action upon a policy of insurance "*from Archangel to Leghorn*," the defendant said, that the agreement before the subscription was, that the adventure should begin, but *from the Downs*; but this agreement was not put into writing. Lord Chief Justice *Pemberton* said, that policies were sacred things; and that a merchant should no more be allowed to go from what he had subscribed in them, than he that subscribes a bill of exchange, payable at such a day, shall be allowed to go from it, and say, it was agreed to be on a condition, when it may be that the bill had been negotiated: for though neither of them are specialties, yet they are of great credit, and much for the support, convenience, and advantage of trade. The jury, notwithstanding this direction, found for the defendant: but afterwards there was a trial at bar, and a verdict was given for the plaintiff, according to the opinion of the Court.

Vide c. 1.

The policy not only proves the extent and nature of the contract; but it also establishes another allegation in the plaintiff's declaration, namely, *that the premium was paid*: for it was formerly shewn, that every policy contains the following clause: "*confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of per cent.*"

The plaintiff having averred in his declaration, that he is interested to the amount of the property insured, it is absolutely necessary that this allegation should be proved. This he must do by a production of all the usual documents, such as *the bills of sale, bills of parcels, and the costs of the outfit; the bills of lading*

lading (a), signed by the master, specifying the goods received on board, and for whom he is to carry them, custom-house clearances, and every other paper, which may be thought necessary to substantiate his right to the property (b). So if the assured has exercised acts of ownership, in directing the loading, &c. of the ship; and paying the people employed, this has been held to be *prima facie* sufficient proof of ownership in the vessel (c).

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The agent or broker of the assured having shewn to the underwriter the protest of the captain, stating the circumstances of the

Senat v.
Porter,
7 Term Rep.
158.

(a) In addition to the bill of lading, &c. it is usual to call the captain or some other person to prove that the goods mentioned in it were actually on board. The first great case, in which the law relative to bills of lading came much under discussion, was in a modern case of *Caldwell* and others v. *Ball*, reported very much at length, and with great accuracy in 1st Term Reports, p. 205. That case was fully argued at the bar, and very much debated on the bench. Amongst other things the court held, that a bill of lading is an acknowledgment under the hand of the captain, that he has received such goods, which he undertakes to deliver to the person named in the bill of lading: that it is assignable in its nature; and by indorsement the property is vested in the assignee. That where several bills of lading of the same date, but of different imports, have been signed, no reference is to be had to time, when they were first signed by the captain: but the person, who first gets one of them by a legal title from the owner or shipper, has a right to the consignment. And where such bills of lading, though different upon the face of them, are constructively the same, and the captain has acted *bona fide*, a delivery according to such legal title will discharge him from them all. But if the intention of the parties appears to have been to bind the net proceeds only, in case of the arrival of the goods, an insurance made on account of the indorser, after such indorsement, is good.

M^r Andrew
v Bell,
1 Esp. Rep.
373.

Hibbert v.
Carter,
1 Term Rep.
745.

(b) Two partners purchased a ship under a regular bill of sale, conformable to the 26 Geo. 3, ch. 60. (Lord *Hawkebury's* act.) They afterwards took in two other partners, who paid their respective shares in the ship, but there was no transfer to them under the direction of the statute: and it was held that the four partners had not an insurable interest in the freight; for as the right of freight results from the right of ownership, these four partners had not shewn in themselves jointly (as laid in the declaration) either a legal or equitable title to the ship. *Camden* and others v. *Anderson*, 5 Term Rep. 709. and *Marsh v. Robinson*, 4 Esp. Rep. 98. Acc.

(c) *Amery v. Rodgers*, 1 Esp. Rep. 207. and frequently since in many cases; particularly in *Robertson v. French*, (4 East's Rep. 130.) which, upon other points, was much discussed. (See ante, p. 60.) But the whole Court held, Lord *Ellenborough* delivering the judgment, that the property of the ship may be proved by parol evidence of the possession of the assured, unless disproved by the production of the written documents of the ship under the Register Act. And it was also held that such parol evidence of ownership, arising from possession at a particular period, was not disproved by producing a prior register in the name of another, and a subsequent register to the same person upon a sale under a decree of the Vice-Admiralty Court, those being perfectly consistent with a title in other persons in the mean time, agreeable to the averment in the declaration.

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The same doctrine had been previously held by Lord Kenyon in *Christian v. Combe*, 2 Eip. R. 489.

loss of the ship insured, and demanding payment, it was held by the Court, on a motion for a new trial, that the delivery of this paper to the defendant did not entitle him to read it, as evidence of the facts contained in it; though had the captain been called to give a different account of the loss from that contained in the protest, it might have been produced to shew that he was not worthy of credit: but it could not be read on the part of the defendant to prove any fact in the case.

Wright v. Barnard, 51rr. after Mich. 1798, at Guildhall.

So also in an action on a policy on the ship, a condemnation of the vessel by a Court of Vice-Admiralty abroad for insufficiency, after a survey had upon oath, was offered in evidence by the underwriters, to prove that there were defects in the ship, from which, want of sea-worthiness at a prior time was meant to be inferred; but Lord *Kenyon* rejected the sentence, as evidence of the facts contained in it; though he admitted it to be read to prove the mere fact of a condemnation having taken place: and this, notwithstanding an order of the Court of Exchequer, directing that it should be admitted in evidence.

Russel v. Buheme, 3 Stra. 1117.

A man having purchased goods beyond sea, in order to prove his property in the cargo, in an action upon a policy of insurance, produced a bill of parcels of one *Gardiner* at *Peterburgh*, with his receipt to it, and proved his hand. The defendant objected, that this was no evidence against the insurers; but the Lord Chief Justice allowed it.

Sir William Lee.

Smith v. La celler, 2 Term Rep. 187.

Before the subject of interest is entirely closed, I will take the opportunity of mentioning, what I omitted in a former chapter, that if a merchant abroad, who is interested in goods and the freight of a cargo, mortgage them to his creditor here for payment of money at a certain day, and by a letter, inclosing the bills of lading, direct an insurance, the mortgagor has still an insurable interest, although the mortgage was become absolute, before the letter directing the insurance was received: and therefore an action was held to lie against the agent for not insuring agreeably to the instructions contained in such letter.

It is, in the last place, incumbent on the plaintiff to prove that a loss has happened, and that, by the very means, stated in the declaration. It is absolutely necessary, that this rule should

be

be strictly adhered to; for otherwise the insurers would come into court prepared to defend themselves against one charge, and one species of loss; and they would then be obliged to resist a demand upon a quite different ground. This appeared clearly in a modern case.

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It was an action on a policy of insurance, which came on to be tried before Mr. Justice *Buller*, who nonsuited the plaintiff. Upon a motion to set aside that nonsuit, the following report was made by the learned judge. The insurance was upon goods on board the ship *Emanuel*, at and from *Falmouth* to *Marseilles*; warranted a *Danish* ship; and on the policy was this memorandum: "The following insurance is declared to be on money expended for reclaiming the ship and cargo valued at the sum, which shall be declared hereafter. The loss to be paid, in case the ship does not arrive at *Marseilles*, and without further proof of interest than this policy; warranted free from all average, and without the benefit of salvage." It appeared that the plaintiffs were proprietors of the cargo but not of the ship. That the ship originally sailed with the cargo on board from *Riga* to *Marseilles*, and that an insurance had been effected at *Bremen* upon the cargo for that voyage; in the course of which she was taken, and brought into *Falmouth*, by an *English* privateer. That a sentence of condemnation had been there obtained, which was afterwards reversed upon the prize having been proved to be a neutral ship, but the expences of procuring that reversal were ordered by the Admiralty Court to be a charge upon the cargo. The plaintiff's agents accordingly paid the sum of 1,031*l.* 14*s.* for the expences of reclaiming the ship and cargo; and immediately procured the policy in question to be effected in *January* 1781, according to the purport of the memorandum. In the *February* following, the ship set sail from *Falmouth* with the original cargo on board, in the prosecution of her voyage to *Marseilles*; but on the 26th of the same month, before her arrival there, was captured by a *Spanish* ship, and carried into *Ceuta* in *Spain*, where she was again condemned. An appeal was brought in the superior court of *Madrid*, which promising to be of long continuance, the cargo, which was of a perishable nature, was ordered to be sold, and the proceeds to be brought into court, to wait the event of the suit. In *May* 1783, the vessel was restored by sentence of the court, and the surplus of the proceeds, which

Kelen
Kemp v.
Vigne,
1 Term Rep.
304.

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which arose from the sale of the cargo, was paid to the owners, deducting the expences incurred in *Spain* in prosecuting the appeal. After all the charges paid, there only remained twenty-six rix dollars. As soon as the ship was liberated she sailed from *Ceuta* to *Malaga*, in order to refit, and having there made the necessary repairs, set sail for *Bremen*, and in that voyage was lost. The insurance made upon the cargo at *Bremen* has been paid. The declaration averred, that " *whilst the ship was proceeding in her said voyage from Falmouth to Marseilles, and before she could arrive at Marseilles, she was captured by the Spaniards, and thereby the said ship, and also the goods and merchandizes on board her, were totally lost to the plaintiffs.*" At the trial it was objected on the part of the defendant, 1st, That this was not an insurable interest; and 2dly, That the plaintiffs could not recover upon the policy in this form of declaring, for they stated the loss to have happened *by capture*; whereas, though the vessel was captured, yet, having been afterwards restored, she might have reached her destined port, notwithstanding the capture, in which case the underwriters would have been discharged by the terms of the memorandum. I was of that opinion, and upon the last ground I nonsuited the plaintiffs.

This case was very fully argued both upon the merits, and the formal objection, after which all the Judges spoke upon the question.

Lord *Mansfield*.—"A loss accrued upon the cargo in the voyage: the underwriter is sued and the loss is averred in the declaration to be *by capture*. The fact of the case is, that the ship was taken by a *Spanish* privateer, but was afterwards restored, and in a condition to pursue the voyage, and was afterwards lost in another voyage."

Mr. Justice *Willes*.—"Upon this case it is clear, that the plaintiffs cannot recover. In the first place, there was certainly a deviation, for the ship set sail for *Malaga* instead of proceeding to *Marseilles*. Secondly, the plaintiff has declared for a loss *by capture*: but after the capture, the policy might still have been complied with by the ship's going to *Marseilles*; and therefore the loss cannot be said to have happened by that circumstance."

Mr.

Mr. Justice *Ashurst* and Mr. Justice *Buller* also delivered their opinions, agreeing with Lord *Mansfield* and Mr. Justice *Willes* upon the formal objection; and both went much at large into the merits, upon which I forbear to follow them or the Chief Justice, as what passed upon that subject is not material to our present enquiry.

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But where a loss is averred to be by perils of the sea, and some of the goods insured are spoiled, and others saved, it is allowable to give the expence of the salvage in evidence upon such an averment, because it is a consequence of the accident laid in the declaration.

In an action on a policy of insurance, for insuring goods on board the ship *A*. the plaintiff declares that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled. The evidence was, that many of the goods were spoiled, but some were saved; and the question was, Whether the plaintiff might give in evidence the expence of salvage, that not being particularly laid as a breach of the policy in the declaration?

Cary v.
King, Cof.
temp. Hard.
B. R. 304.

Lord *Hardwicke* Chief Just.—“I think they may give it in evidence; for the insurance is against all accidents. The accident laid in this declaration is, that the ship sunk in the river; it goes on and says, that by reason thereof the goods were spoiled, that is the only special damage laid: yet it is but the common case of a declaration that lays special damage, where the plaintiff may give evidence of any damage that is within his cause of action as laid. And though it was objected, that such a breach of the policy should be laid, as the insurer may have notice to defend it, it is so in this case, for they have laid the accident, which is sufficient notice, because it must necessarily follow, that some damage did happen.”

CHAPTER THE TWENTY-FIRST.

Of Bottomry and Respondentia.

C H A P.
XXI.^a Blackst.
Com. 457.² Blackst.
Com. 458.^a Valin
Com p 4.^a Blackst.
Com. 458.
¹ Siderfin.
27.

THE contract of bottomry is in the nature of a mortgage of a ship, when the owner of it borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ship, as a security for the repayment; and it is understood, that if the ship be lost, the lender also loses his whole money; but if it return in safety, then he shall receive back his principal, and also the premium or interest stipulated to be paid, however it may exceed the usual or legal rate of interest. When the ship and tackle are brought home, they are liable, as well as the person of the borrower, for the money lent.—But when the loan is not made upon the vessel, but upon the goods and merchandizes laden thereon, which, from their nature, must be sold or exchanged in the course of the voyage, then the borrower only is *personally* bound to answer the contract; who therefore in this case is said to take up money *at respondentia*. In this consists the difference between *bottomry* and *respondentia*; that the one is a loan upon the ship, the other upon the goods: in the former the ship and tackle are liable, as well as the person of the borrower: in the latter, for the most part, recourse must be had to the person only of the borrower. Another observation is, that in a loan upon bottomry, the lender runs no risk, though the goods should be lost; and upon respondentia, the lender must be paid his principal and interest, though the ship perish, provided the goods are safe. But in all other respects, the contract of bottomry and that of respondentia are upon the same footing; the rules and decisions applicable to one, are applicable to both; and therefore, in the course of our enquiries, they shall be treated as one and the same thing, it being sufficient to have once marked the distinction between them.

These terms are also applied to another species of contract, which does not exactly fall within the description of either; namely, to a contract for the repayment of money, not upon the ship and goods only, but upon the mere hazard of the voy-

age itself; as if a man lend 1000*l.* to a merchant to be employed in a beneficial trade, with a condition to be repaid with extraordinary interest, in case a specific voyage named in the condition shall be safely performed: which agreement is sometimes called *fœnus nauticum* or *usura maritima*. But as this species of bottomry opened a door to gaming and usurious contracts, especially in long voyages, the legislature, at the time it suppressed insurances upon wagering policies, introduced a clause, by which it was enacted, "that all sums of money lent on bottomry, or at respondentia, upon any ship or ships belonging to his Majesty's subjects, bound to or from the East Indies, should be lent only on the ship, or on the merchandise or effects, laden or to be laden, on board of such ship, and should be so expressed in the condition of the said bond; and the benefit of salvage should be allowed to the lender, his agents or assigns, who alone shall have a right to make assurance on the money so lent; and no borrower of money on bottomry, or at respondentia, shall recover more on any insurance than the value of his interest in the ship, or in the merchandizes and effects laden on board thereof, exclusive of the money so borrowed; and in case it should appear that the value of his share in the ship or in the merchandizes or effects laden on board of such ship, did not amount to the full sum or sums he had borrowed as aforesaid, such borrower should be responsible to the lender for so much of the money borrowed, as he had not laid out on the ship or merchandizes laden thereon, with lawful interest for the same, in the proportion the money not laid out should bear to the whole money lent, notwithstanding the ship and merchandizes should be totally lost."

C H A P.
XXI.Molloy, lib.
2. c. 11. f. 8.19 Geo. II.
c. 37. f. 5.

This statute has entirely put an end to that species of contract which was last mentioned, namely, a loan upon the mere voyage itself, as far, at least, as relates to India voyages; but as none other are mentioned, and as *expressio unius est exclusio alterius*, these loans may be made in all other cases, as at the Common Law, except in the following instance, which is another statute prohibition. The statute alluded to declares, that all contracts made or entered into by any of his Majesty's subjects, or any persons in trust for them, for or upon the loan of any monies by way of bottomry, or any ship or ships in the service of foreigners, and bound or designed to trade in the East Indies or parts aforesaid, shall be null and void.

7 Geo. I.
c. 21. f. 2.

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This act, it should seem, does not mean to prevent the king's subjects from lending money on bottomry on foreign ships trading from their own country to their settlements in the *East Indies*. The purpose of the statute was only to prevent the people of this country from trading to the *British* settlements in *India* under foreign commissions, and to encourage the lawful trade thereto.

Sumner v.
Green, 1 H.
Blackst. 301.

It lately became a question in the Court of Common Pleas, whether an *American* ship, since the declaration of *American* independence, was a *foreign* ship, within the statute of the 7 *Geo. 1. ch. 21. s. 2.* It came before the court, upon a motion to discharge the defendant out of custody upon entering a common appearance. The defendant was held to bail upon a respondentia bond, which was executed by the defendant, who was an *American*, to secure the payment of a cargo shipped by the plaintiff on board an *American* ship in the *East Indies*, homeward bound from *Calcutta* to *Rhode-Island* in *America*. The ship had sailed from *England*, and landed a cargo of *European* goods in *Bengal*, previous to her taking in the cargo, on which the bond was given.

The Court were much inclined to think the bond was void, the case being within the mischief designed to be remedied by the act. But as the question was of considerable consequence, they thought it not proper to be discussed on this summary application: but they ordered the defendant to be discharged on the ground, that where it appeared from the affidavit to hold to bail, that there was a probability of the contract being void, on which the action was founded, it would be wrong to detain the defendant in prison: more particularly as the plaintiff would by such means have an opportunity of tampering with the defendant in prison, and of escaping from the penalties of the act, by preventing the case from being brought before the court.

Ord. of Lou.
14. tit. des
Contrats à
grosse Avant.
art. 3.

A loan upon the voyage, without a security on the ship or goods, is entirely prohibited by the laws of *France*; for in the marine ordinances of that country, there is a *general* regulation similar to that made here with respect to *India* ships; "Faisons
" défenses de prendre deniers à la grosse sur le corps et quille du
" navire, ou sur les marchandises de son chargement, au dela
" de

de leur valuer, au peine d'être contraint, en cas de fraude, au paiement des sommes entieres, non obstant la perte ou prise du vaisseau. And in another place it is said, that where a greater sum is borrowed than the ship or goods are worth, where there is no fraud, the contract is void, except as to the amount of the real value of the ship or goods. If then the contract be only binding as far as there is property to answer the loan, it follows that, by the laws of *France*, this contract cannot exist upon the hazard of the voyage merely, unless there be a security also upon the ship or goods.

C H A P.
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Loc. cit.
art. 15.

The contract of bottomry and respondentia seems to deduce its origin from the custom of permitting the master of a ship, when in a foreign country, to hypothecate the ship in order to raise money to refit. Such a permission is absolutely necessary, and is impliedly given him in the very act of constituting him master, not indeed by the Common Law, but by the Marine Law, which in this respect is reasonable; for if a ship happen to be at sea, and spring a leak, or the voyage is likely to be defeated for want of necessaries, it is better that the master should have it in his power to pledge the ship and goods (a) or either of them, than that the ship should be lost, or the voyage defeated. But he cannot do either for any debt of his own: but merely in cases of necessity, and for completing the voyage. Although

2 Blackst.
Com. 457.

Barnard v.
Bridgman,
Moor, 918.
fully reported
in Hobart, p. 11.

Molloy, b. 2.
c. 2. f. 14.
Leg. Oler.
art. 1 & 22.

(a) That the master might hypothecate the goods, as well as the ship, in cases of necessity, depended till lately more upon a general understanding that such hypothecation might be made, than upon any very direct authority upon the point. In a note to a case in Salkeld, it is said that the master may hypothecate either ship or goods; for the master is entrusted with both, and represents the traders, as well as the owners of the ship.

Justin v.
Ballam,
1 Salk. 347

But in a late case in the High Court of Admiralty in *England*, this question has undergone all that elaborate and learned discussion which the abilities of the advocates of that court were so competent to afford it; and has met with a decision, confirming the above note of *Justin v. Ballam*, formed upon mature deliberation and solid argument, as will appear from the judgment pronounced by the eminent person who presides in that court. It was my intention to have given an abstract of the judgment: but an abridgment would have done great injustice to the argument of that learned judge; and therefore I content myself with having referred to the subject as so settled, and having pointed out to the reader the valuable reports in which the arguments both of the judge and advocates may be found at large. The extent of that decision seems to be this, that the master of a vessel, carrying a cargo on freight, may, in a foreign port, hypothecate that cargo for the repairing damages sustained by the ship at sea; such repairs being absolutely necessary for the purpose of delivering the cargo, according to the charter party.

The ship
Gratitude,
3d vol. of
Robinson's
Admiralty
Rep p. 240.

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Laws of the
Hanse
Towns,
art. 60.

Hobart, 11.
Noy, 95.

Malloy, l. 2.
c. 11. f. 11.

Malloy loc.
cit.

Ord. of Lou.
14. tit.
Avant à la
grosse, art.
8 & 9.

2 Valin
Com. 10.

Portier, Tr.
du pret. à la
grosse Avant.
not. 6.

the master of the vessel has this power while abroad, because it is absolutely necessary for purposes of commerce and navigation; yet the very same authority which gave that power in those cases, has denied it when he happens to be in the same place where the owners reside. Thus the laws of *Oleron*, in the place above cited, speak of the captain being in a foreign country, and first writing home to his owners for money, before he takes money on bottomry: and the laws of the *Hanse Towns*, which were founded on those of *Oleron*, speak the same language; for they say, "a master being in a *strange country*, if necessity drive him "to it, may take up money on bottomry, if he cannot get it "without, and the owners shall bear the charge." In addition to this, from all the cases, which have been determined at the Common Law upon the subject, it may be inferred that the ship should be abroad, as well as in a state of necessity, to justify the captain or master in taking money on bottomry. *Malloy* in express terms declares, that a master has no power to take up money on bottomry, in places where his owners dwell; otherwise he and his estate must be liable thereto.—If, indeed, the owners do not agree in sending the ship to sea, the majority shall carry it, and then money may be taken up by the master on bottomry for their proportion who refuse, although they reside upon the spot, and it shall bind them all. The two last rules are the same with the marine ordinances of *France* upon that point: for they also declare, that those who lend money to the master, in the place where the owners reside, without their consent, shall have no security or hypothecation, but on such part of the ship only as belongs to the master himself, even though the money was advanced for repairs, or for purchasing provisions. But that the shares of those owners, who refuse to send out the ship, shall be affected by the loan of money to the master for necessaries. The justice and propriety of such a regulation, are evident from considering that such a contract was only intended for the benefit of all parties in those places where the owners had neither a residence, nor any correspondents.

The contract of which we treat is of a different nature from almost all others: but that which it most nearly resembles is the contract of insurance: for the lender on bottomry or at respondentia, runs almost all the same risks, with respect to the property on which the loan is made, that the insurer does with respect

respect to the effects insured. There are, however, some considerable distinctions; for instance, the lender supplies the borrower with money to purchase those effects upon which he is to run the risk: not so with the insurer. There are also various other distinctions.

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But however similar they may be in other respects, they differ very much in point of antiquity. We have formerly endeavoured to show that the contract of insurance was certainly unknown to the traders of the ancient world: but it is equally clear that with the contract of bottomry and respondentia, or what was equivalent to it, they were perfectly acquainted. In those fragments of the famous sea laws of the *Rhodians*, which have been preserved and transmitted to our times, I think there are very evident traces of this species of contract. In one section it is said, "that when masters of ships, who are proprietors of one third of the lading, take up money for the voyage, whether for the outward or homeward bound, or both; all transactions shall pass according to the writings drawn up between the master and lender, and the latter shall put a man on board the ship to take care of his loan." But in another place, these laws speak more explicitly, and with a direct reference to the distinction between naval interest, and that which is given for a land risk. "If masters or merchants borrow money for their voyages, the goods, freights, ships, and money, being free, they shall not make use of suretyship, unless there be some apparent danger either of the sea or of pirates. And for the money so lent, the borrowers shall pay *naval interest*." From these two quotations, little doubt can be entertained, but that the *Rhodians* used to borrow and lend, upon the hazard of the voyage, for an increased premium. It was formerly seen that the *Rhodian* laws in general were adopted by the *Romans*; and consequently that branch of them, which relates to bottomry amongst the rest; for you can hardly open a book upon the *Roman* law, but you meet with chapters, *de nautico fœnore, de nauticis usuris*, which plainly show that this contract was well known to the jurists of that distinguished nation. It was also called by them *pecunia trajecititia*: because it was given to the borrower to be employed by him in commerce upon and beyond the sea. It appears from *Valin*, that some writers of the *French* nation had supposed, that this contract was wholly unknown to

Vide the Introduction.

Leg. Rhod.
l. 1. art. 28.

Leg. Rhod.
l. 1. art. 16.

Digest. lib.
22. tit. 2.
Cod. lib. 4.
tit. 33.

2 Valin,
Côm. 1.

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the ancients, and that it was peculiar to *France* alone, *Falke* very clearly exposes the absurdity of such an idea; and it seems to be sufficiently answered, if deserving of an answer, by what has been already said. In addition to this we may add, that so far from being peculiar to *France*, it has obtained a place in the codes of all the maritime states, whose laws have been promulgated, or have been at all famous in the modern world. In this chapter we have already had occasion to cite two passages from the judgments, or laws of *Oleron* upon the subject, as well as the 60th article of the laws of the *Hanse* towns: and by a reference to the 45th article of the laws of *Wijbuy*, it will be found, that the nature of bottomry, as well as its name, was perfectly known to the makers of those ordinances.

Art. 1 & 28.

Laws of
Wijb. art.
45.

Le Guid.
c. 18. art. 2.

2 Emerigon,
p. 324.

In the *Guidon*, indeed, it is supposed that the contract of bottomry now in use, is not at all the same as that which was known to the ancients. This authority is respectable: but facts must speak for themselves; in addition to which, the celebrated *Emerigon* has observed, that the assertion of the author of the *Guidon* is only true with respect to the form which the modern regulations have given to this contract, the true origin of which is lost in its antiquity.

Molloy,
lib. 2. c. 11.
s. 8. 23.
2 Vel. 148.

2 Vel. 154.

13 Ann.
stat. 2. c. 1
Pothier, 6.
Not. 16.

In our definition of bottomry it was said, that if the ship arrive safe, the lender shall be paid his principal, and the stipulated interest due upon it, however much it exceed the legal rate. The true principle, upon which this is allowed, is not merely the great profit and convenience of trade, as has frequently been urged; but the risk which the lender runs of losing both principal and interest; for he runs the contingency of winds, seas, and enemies. It is therefore of the essence of a contract of bottomry, that the lender runs the risk of the voyage; and that both principal and interest be at hazard; for if the risk go only to the interest or premium, and not to the principal also, though a real and substantial risk be inserted, it is a contract against the statute of usury, and therefore void. This has been frequently so determined in our courts of law; and it is consonant to the ideas of foreign writers.

Sharpley v.
Hurrell,
Cro. Jac.
208.

An action of debt was brought upon an obligation. The defendant pleaded the statute of usury, and showed, that a ship went

went to fish in *Newfoundland*, (which voyage might be performed in eight months,) and that the plaintiff delivered 50*l.* to the defendant, to pay 60*l.* upon the return of the ship off *Dartmouth*; and if the said ship, by occasion of leakage or tempest, should not return from *Newfoundland* to *Dartmouth*, then the defendant should pay the 50*l.* only; and if the ship never returned, he should pay nothing. And it was held by all the court, not to be usury within the statute. For if the ship had stayed at *Newfoundland* two or three years, he should have paid at the return of the ship but 60*l.*: and if the ship never returned, then nothing; so that the plaintiff ran the hazard of having less than the interest which the law allows; and possibly, neither principal nor interest.

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This case was, upon another occasion, mentioned in argument by one of the judges on the bench; the principle on which it was decided, was recognized, and the case itself allowed to be law.

Roberts v.
Tremayne,
Cro Jac.
508.

So also in another case of debt upon an obligation, conditioned to pay so much money, if such a ship returned within six months from *Ostend* in *Flanders* to *London*, which was more by the third part than the legal interest of money; and if she do not return, then the obligation to be void: the defendant pleaded that there was a corrupt agreement betwixt himself and the plaintiff, and that at the time of making the obligation, it was agreed betwixt them, that he should have no more for interest than the law permits, in case the ship should ever return; and avers that the obligation was entered into by covin, to evade the statute of usury, and the penalty thereof: upon this averment the plaintiff took issue, and the defendant demurred.

Joy v. Kent,
Hard. Rep.
418.

Lord Chief Baron *Hale*.—"Clearly this bond is not within the statute, for this is the common way of insurance; and if this were void by the statute of usury, trade would be destroyed: It is not like to the case, where the condition of the bond is to give so much money, if such or such a person be then alive; for there is a certainty of that at the time. But it is uncertain and a casualty whether such a ship shall ever return or not."

In another case of debt upon an obligation for 300*l.* the condition was, that if such a ship went to *Surat* in the *East Indies*,

Soome v.
Gleen,
1 Sid. 27.
1 Lev. 54.

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and returned safe ; or if the owner, or the goods laden on board the ship returned safe, then the defendant was to pay the principal to the plaintiff, and 40*l.* for each 100*l.* ; but that if the ship should perish by unavoidable casualties of sea, fire, or enemies, to be proved by sufficient testimony, then the plaintiff should have nothing. The doubt was, whether this was an usurious contract : and it was said to be so, because the payment depended upon so many things, one of which, in all probability would happen. But the whole court held it not to be within the statute.

Lord Chief Justice *Bridgman* took a distinction between a bargain of this kind and a loan ; for where there is a bargain, as here, and the principal is hazarded, that cannot be within the statute of usury ; but it is otherwise of a loan, where the principal is not in danger. Here there are apparent risks of the sea, fire, and enemies, and the length of the voyage ; all of which endanger the loss of the principal. These bottomry contracts are for the advancement of trade, and therefore judgment must be for the plaintiff.

These cases are all uniform in the principle which they go to establish, that, on account of the risk, the interest shall be larger than the common rate : but notwithstanding this, a case is to be found in the Equity Reports, which directly tends to destroy the rule of decision in all these cases.

Dandy v.
Turner,
2 Equity
Cases Abr.
374

A part owner of a ship borrowed money of the plaintiff upon a bottomry bond, payable on the return of the ship from the voyage she was then going in the service of the *East India Company*, who broke up the ship in the *East Indies* ; and the owners brought their action against the Company, and recovered damages, which did not, however, amount to a full satisfaction. The plaintiff brought his bill to have his proportionable satisfaction out of the money recovered ; but his bill was dismissed, and he was left to recover as well as he could at law ; for a court of equity will never assist a bottomry bond, which carries *unreasonable interest*.

This case conveys a very unmerited censure upon bottomry bonds, not at all warranted by the long chain of uniform decisions

sions in their favour. Indeed, from the very nature of the contract, they are to carry the naval interest, which is always greater than land interest, in proportion as the risks run by the lender on bottomry are much greater than those which a lender upon common bonds incurs (a).

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To be sure if a contract were made, by colour of bottomry, in order to evade the statute, it would be usurious and void, and highly deserving of all the censure and discouragement which the courts, either of law or equity, could possibly throw upon it.

4 Com. Dig.
293.
2 Vol. 146.

In *England* then it is clear, from these cases, that there is nothing unlawful in the contract of bottomry: but some writers in foreign countries have endeavoured to hold it up to the world, as an illicit and an usurious bargain. *Straccha*, who has written upon insurances, has introduced a long dissertation to prove the truth of this position; and several other writers have either preceded or followed him in support of the same doctrines. If, indeed, the money so lent were given merely by way of a loan, and such excessive interest were demanded for the use of the money only; there might be force in the objection. But when it is considered as the price of the great risks incurred, it has not the least semblance of usury; it is a fair and conscientious contract, highly beneficial to the commerce and general interests of society.

Introd. de
Assur.
No. 26.

These authors have met with very able opposers in *Pothier* and *Emerigon*, who have clearly shewn the fallacy of their doctrine; and they have proved to demonstration, that even the fathers of the church have acknowledged, that this contract has nothing in it offensive to religion or good morals. Almost all the writers of eminence agree with the two last named, as to the legality of loans on bottomry and at respondentia; and it is now universally admitted and practised in all the maritime and trading countries in *Europe*.

Pothier
Aventure
à la grosse,
Not. 2.
2 Emer. 390.
Loccenius,
lib. 2. c. 6.
Nº. 36.
Roccus de
Navibus et
Danlo, Not.
50. 2 Black.
Com. 457

(a) Mr. *Fonblaque*, in his valuable edition of "A Treatise of Equity," has supposed that in the above passage I meant to complain of the interference of a Court of Equity in cases where exorbitant naval interest was demanded. But a little attention to the passage complained of, and also to what follows, will demonstrate, that I only alluded to general censures upon a species of contract so highly beneficial for commercial purposes. See *Fonbl.* vol. i. p. 243.

But

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But as the hazard to be run is the very basis and foundation of this contract; it follows, that if the risk is not run, the lender cannot be entitled to the extraordinary premium; for that would be to open a door to means by which the statutes of usury might be evaded. This was so decided in the Court of Chancery.

*DeGuilder v.
Depeister,
2 Vern. 263.*

The case was upon a bottomry bond, whereby the plaintiff was bound in consideration of 400*l.* as well to perform the voyage within six months, as at the six months' end to pay the 400*l.* and 4*q.* premium, in case the vessel arrived safe, and was not lost in the voyage. It happened that the plaintiff never went the voyage, whereby the bond became forfeited, and he now preferred his bill to be relieved. Upon the former hearing, as the ship lay all the time in the port of *London*, and there was no hazard of losing the principal, the Lord Keeper thought fit to decree, that the defendant should lose the premium of 4*q.* and be contented with his principal and *ordinary interest*. And now, upon a rehearing, he confirmed his former decree.

*Pothier
Traité à la
Grosse
Avanture,
Not. 38.
2 Valin, 10.*

With this decree, which is equitable and just, the *French* writers agree. They say, that in such a case, "L'emprunteur
" sera bien obligé de rendre la somme qui lui a été prêtée, mais
" il ne sera pas obligé de payer en outre la somme qu'il a promis
" de payer pour le profit maritime; car le profit maritime étant
" le prix des risques que le prêteur devoit courir des effets sur
" lesquels le prêt été fait, il ne peut lui être dû de profit mari-
" time quand il n'a couru aucuns risques, ne pouvant pas y avoir
" un prix des risques, s'il n'y a pas eu de risques."

*Wade the
Appendix,
No. 2.*

*Beawes Lex
Merc. Red.
4th edit.
p. 127.*

Bottomry bonds generally express from what time the risk shall commence, as that the ship shall sail from *London* to such a port abroad, &c. In such cases, the contingency does not commence till the departure: and therefore if the ship receive injury by storm, fire, &c. before the beginning of the voyage, the person borrowing alone runs the hazard. But if the condition be, "that if the ship shall not arrive at such a place by such a time, then," &c.; in these instances, the contract commences from the time of sailing, and a different rule, as to the loss, will necessarily prevail.

*2 Magens,
28. 100.*

We have shown at the beginning of this chapter, that the amount of the loan on bottomry or respondentia, in this country,

is not restrained by any regulation whatever; although it is in many maritime states by express ordinances: that the only restriction in the law of *England* is, with respect to money lent on ships and goods going to the *East Indies*, which, by statute, must not exceed the value of the property on which the loan is made. It remains then to see what those risks are, to which the lender undertakes to expose himself. These are for the most part mentioned in the condition of the bond, and are nearly the same, against which the underwriter, in a policy of insurance, undertakes to indemnify, "*Limita hoc singulariter, ut creditor subeat periculum navigationis, in casibus fortuitis tantum.*" These accidents are, tempests, pirates, fire, capture, and every other misfortune, except such as arise either from the defects of the thing itself, on which the loan is made, or from the misconduct of the borrower: for, says the *Italian* lawyer, last quoted, in continuation of the above sentence, "*Secus est si infortunium, vel naufragium ex culpa debitoris processerit, quia tunc creditor non tenetur de periculo, et damno, in quod incurritur ex culpa vehentis, prout in simili deciditur in materia assicurationis, ut quantumcumque assicuratio sit generalis, non contineat periculum, aut damnum, quod facto assicurati contingit.*"

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19 Geo. 2.
c. 37. § 5.

Vide the
Appendix,
No. 2.
Roccus de
Vavibus,
Not. 51.

2 Valin, 24.
Roccus, loc.
cit.

It seems to have been a doubt late in the last century, whether a loss by the attacks of pirates fell within the words, perils of the sea; for it was argued in the King's Bench, in the reign of *James* the Second. But the Court were of opinion, that piracy was one of the dangers of the seas.

Barton v.
Wolliford,
Comb. 56.

The lender is answerable likewise for losses by capture; or to speak more accurately, if a loss by capture happen, he cannot recover against the borrower; but in bottomry and respondentia bonds, capture does not mean a mere temporary taking, but it must be such a capture as to occasion a total loss. And therefore, if a ship be taken and detained for a short time, and yet arrive at the port of destination within the time limited, (if time be mentioned in the condition,) the bond is not forfeited, and the obligee may recover.

This doctrine was laid down by the whole Court of King's Bench, in a case upon a bond of this nature; the proceedings on which were fully stated, when the unanimous opinion of the

Joyce v.
Williamson,
B. R. Mich.
Term,
23 Geo. III.
court

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court was delivered by Lord *Mansfield*.—"This comes before the court upon a motion, on the part of the defendant, for a new trial. It was an action of debt upon a bottomry bond; the condition of which was, that upon the ship's safe arrival at *New York*, a certain sum of money should be paid to the plaintiff; but that in case the ship should miscarry, be lost, cast away, or taken by the enemy, the plaintiff should have nothing. The defendant pleaded three pleas: 1st, *Non est factum*; 2dly, That the ship did not arrive at *New York*, the port of destination; 3dly, that the ship was captured. Upon the two first pleas issue was joined: and to the last, there was a replication of recapture. The facts, which appeared in evidence on the trial, are these: *the ship was taken before her arrival at New York*, by two *American* privateers, which detained her for one month, and plundered her of her stores; at which time *she was retaken* by an *English* privateer and carried into *Halifax*. The Admiralty Court adjudged her to be a good prize to the *English* privateer, and decreed that she should be restored to the original owners, on paying one eighth for salvage: that she proceeded with the remainder of her cargo to *New York*, and earned her freight: that the value of the ship was not sufficient to satisfy the bond. These are the facts. Now it is clear, that by the law of *England* there is neither average nor salvage upon a bottomry bond. It was indeed contended at the bar on the part of the defendant, that this case was within the saving of the bond; for it is provided, that in case of loss by capture, &c. the bond should be void: and that here there was a capture, and a detention for one month. But upon consideration, we think that a capture within this condition does not mean a temporary capture, but it must be a total loss: now here it was not such a capture as to occasion a total loss. The voyage was not lost, for the defendant pursued it and earned his freight. Freight depends upon the safety of the ship; and as the freight was earned, the ship must have arrived safe at the port of destination. In whatever way we determine this case, there must be a hardship: but we are all of opinion, that the verdict is right, and that the rule for a new trial must be discharged.

From the case we not only learn what shall be deemed a capture, within the meaning of that word in a bottomry bond, but we derive from it a piece of very essential information, namely,
that

that a lender on bottomry, or at respondentia, is neither entitled to the benefit of salvage, nor liable to contribute in case of a general average. This was expressly said by Lord Mansfield in delivering the judgment of the court. His Lordship's opinion is confirmed by the statute of the 19th of George the Second, c. 37. which allows the benefit of salvage to lenders upon ships or goods going to the *East Indies*; clearly shewing that there was no such thing at the Common Law, otherwise there was no occasion to make such a provision.

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19 Geo. 2.
c. 37. l. 3.

In this respect our law differs from that of *France*, for the ordinances, and indeed it seems always to have been the case in that country, expressly declare, that the lenders on bottomry shall be subject to general or gross average, in the same manner as insurers are upon policies of insurance; for that as these contracts depend upon the same principles, they are subject to the same regulations.

Le Guidon.
c. 19. art. 5.
2 Valin, 19.
2 Emer. 504.

Our law in this respect is different also from that of *Denmark*. This lately appeared in a cause tried in the King's Bench before Lord Kenyon at *Guildhall*.

It was an action on a policy of insurance upon a *respondentia* bond on ship and goods, at and from *B.* to *C.* The ship was *Danish*, and an average loss was sustained upon the goods to the amount of 6l. 15s. *per cent.* and the plaintiff, as holder of a *respondentia* bond, had been called upon to contribute; and now brought his action against the *English* underwriters for the amount of that contribution.

Walpole v.
Ever, Sitt.
after Trial.
1789.

Lord Kenyon Chief Justice.—“By the law of *England*, a lender upon *respondentia* is not liable to average losses; but is entitled to receive the whole sum advanced, provided ship and cargo arrive at the port of destination. The plaintiff contends, that as by the law of *Denmark*, such lenders upon *respondentia* are liable to average, and bound to contribute according to the amount of their interest, the insurer must answer to them. The *Danish* Consul has proved that he received a judgment of the Court of *Copenhagen*, the decretal part of which proves the law of *Denmark* to be as the plaintiff has stated it. The opinions of several

C H A P. **XXI.** several men of eminence in that country have been offered on each side: but I reject them, because the solemn decision of a court of competent jurisdiction is of much greater weight, than the opinions of advocates, however eminent, or even than the extrajudicial opinions of the most able judges. It seems as if in this case, the underwriters were bound by the law of the country, to which the contract relates." Verdict for the plaintiff (a).

It has been said, that if the accident happen by the default of the borrower, or of the captain, the lender is not liable, and has a right to demand the payment of the bond. If, therefore, the ship be lost by a wilful deviation from the track of the voyage, the event has not happened, upon which the borrower was to be discharged from his obligation. This has been decided in several cases.

(a) This is not the only case, in which the insurers have been held liable to indemnify, the insured having been obliged by the law of a foreign country to pay a larger sum than by the laws of *England* could have been demanded: though to be sure, in the case about to be quoted, there seems to have been an usage proved; and upon that the learned judge much relied, and seems to have doubted the general rule as afterwards stated by Lord *Kenyon* in the case of *Walpole v. Ewer*.

Newman v. Cazalet, Sittings at Guildhall after Hilary. It was an action on a policy, upon a cargo of fish from *Newfoundland* to any port of *Spain, Portugal, or Italy*. The ship met with bad weather, and put into *Alicant* and *Leghorn* to repair. The captain being owner, presented a petition to the commercial court of *Pisa*, to adjust the general average, as he had put in for the general benefit of all concerned. The court, according to its usual course (which appears to be a very extraordinary one) adjusted the loss by charging the cargo at its full value, but the ship only at one half, and the freight at one third: and they also charged as a part of the general average, the seamen's wages and provisions, while in port. The defendant, as underwriter, had paid into court as much as would cover the average; if adjusted according to the memorandum in the policy, and the law and usage of *England*. The question was, Whether the plaintiff having been compelled to pay beyond that sum, according to the calculation of the sentence of the court of *Pisa*, it was conclusive upon the defendant, and the plaintiff was entitled to recover his average by the same standard. The plaintiff called several brokers, who said that in repeated instances they had adjusted averages under similar sentences of the court of *Pisa*; and the underwriters, though with reluctance, had always paid them.

Mr. Justice *Buller*.—"On the general law, the plaintiff would fail; but in all matters of trade, usage is a sacred thing. I do not like these foreign settlements of average, which make underwriters liable for more than the standard of *English* law. But if you are satisfied it has been the usage, upon the evidence given, it ought not to be shaken." The plaintiff had a verdict accordingly.

An action of debt was brought upon an obligation for performance of covenants in an indenture, wherein it was recited, that such a ship was in the service of the *East India Company*, and that it was to obey such orders as they or their factors should give; and that she was designed for a voyage from *London* to *Bantam*, and from thence to *China* or *Formosa*. The plaintiff lent 500*l.* upon the hull of the ship, and the defendant covenanted to pay, if the ship went from *London* to *Bantam*, and returned from thence directly to *London*, 550*l.*: if from *London* to *Bantam*, and from thence to *China* or *Formosa*, and returned to *London* within 24 months, 650*l.*. If she returned not within 24 months, then to pay 5*l.* per month above 650*l.* till the 36 months: and if she returned not within 36 months, then to pay 710*l.* unless it can be proved by *Wildy*, that the ship returned not, but was lost within 36 months. The ship, in fact, went from *London* to *Bantam*, and from thence to *Surat*, and other parts, and so returned to *Bantam*: and in her voyage from *Bantam* to *London*, was lost within 36 months: upon which the present action was brought.

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Western
v. Wildy,
Skinn. 152.

The court inclined to be of opinion, that the ship having deviated from the voyage described, in going to *Surat*, the plaintiff was not to bear the loss, and was consequently entitled to recover. They, however, took time to deliberate; and after consideration, gave judgment for the plaintiff.

In another case of debt upon a bottomry bond, the defendant pleaded, that the ship went from *London* to *Barbadoes*, *sine deviation*, and afterwards she returned from *Barbadoes* towards *London*, and in her return was lost in *voyagio predicto*; the plaintiff replied, that the ship in her return went from *Barbadoes* to *Jamaica*; and that after a stay there, she returned from *Jamaica* towards *London*, and was lost, and so shows a deviation. The defendant rejoined, that she was pressed into the king's service, and so was compelled to go to *Jamaica*, which is the deviation pleaded by the plaintiff; without this that she deviated after she was pressed. The plaintiff demurred, and judgment was given for the plaintiff. The plea of the defendant is not good; for he pleads that the ship went from *London* to *Barbadoes* without deviation, and that in the return she was lost in the voyage aforesaid:

Williams v.
Steadman,
Holt's Rep.
126. Skinn.
345. S. C.

C H A P. said : but it does not show *without deviation*. Now the condition
 XXI. is so in express words, and he ought to show expressly that he
 has performed the words of the condition.

2 Eq. Cases, The same rule of decision has been adopted in the Courts of
 Abr. 372. Equity.
 3 Ch. Cases,
 230.

The plaintiff entered into a penal bond to pay 40s. per month for 50l.: the ship was to go *from Holland to the Spanish islands, and to return to England*: but if she perished, the defendant was to lose his 50l. The ship went accordingly to the *Spanish islands*, took in *Moors* at *Africa*, then went to *Barbadoes*, and perished at sea. The plaintiff, being sued at law upon the bond, came into equity, suggesting that *the deviation was through necessity*. But this bill was dismissed, except as to the penalty.

C. 1. There is no restriction by the law of *England* as to the persons, to whom money may be lent on bottomry, or at respondentia (a). In a former part of this work, we gave the history of a statute introduced into our code of laws, to prevent insurances from being made on the ships or goods of *Frenchmen*, during the then existing war with *France*. The same statute also prohibited his majesty's subjects from lending money on bottomry or at respondentia on any ships or goods belonging to *France*, or to any of the *French* dominions or plantations, or the subjects thereof: and in case they should, such contracts were declared void; and the parties thereto, or the agent or broker interfering therein were to forfeit 500l. That act was not of long continuance, on account of the peace, which almost immediately followed it: and these restraints upon this species of contract were never again revived by any subsequent positive law (b).

21 G. 2.
 c. 4.

Lex Merc.
 Red. 4th ed.
 p. 128.

It frequently happened, as appears by the preamble to the following statute, that the borrowers on bottomry or at respondentia, became bankrupts after the loan of the money, and before the

(a) See one exception as to loans on the ships of foreigners trading to the *East Indies*, ante, page 553.

(b) See the arguments as to the legality of insuring the property of an enemy, ante, p. 314. which necessarily tend also to prevent this species of contract from being entered into with an enemy.

event happened, which entitled the lender to repayment : by which means the debt could not be proved under the commission, and the lenders were left to such redress as they could obtain from the bankrupt, who had previously given up every thing to his other creditors. This being likely to prove a discouragement to trade, parliament was obliged to interpose ; and it accordingly enacted, " That the obligee in any bottomry or respondentia bond, made and entered into upon a good and valuable consideration, *bond fide*, should be admitted to claim, and after the contingency should have happened, to prove his or her debt or demands in respect of such bond, in like manner as if the contingency had happened before the time of the issuing of the commission of bankruptcy against such obligor, and should be entitled unto, and should have and receive a proportionable part, share, and dividend of such bankrupt's estate, in proportion to the other creditors of such bankrupt, in like manner as if such contingency had happened before such commission issued : and that all and every person or persons, against whom any commission of bankruptcy should be awarded, should be discharged of and from the debt or debts owing by him, her, or them, on every such bond as aforesaid, and should have the benefit of the several statutes now in force against bankrupts, in like manner, to all intents and purposes, as if such contingency had happened, and the money due in respect thereof had become payable before the time of the issuing of such commission."

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19 Geo. 2.
c. 32. §. 2.

By the statute book it appears, that the masters and mariners of ships having taken upon bottomry greater sums of money than the value of their adventure, had been accustomed wilfully to cast away, burn, or otherwise destroy the ships under their charge, to the great loss of the merchants and owners : it was therefore enacted, " That if any captain, master, mariner, or other officer belonging to any ship, should wilfully cast away, burn, or otherwise destroy the ship unto which he belonged, or procure the same to be done, he should suffer death as a felon." The duration of this act having been limited to three years, it became extinct : but the necessity of such a provision was so great, that a similar law was made a few years afterwards, and is still in force.

16 Ch. 2.
c. 6. §. 12.

21 & 23 Ch.
2. c. 11.
§. 12.

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Vide ante,
C. I.
3 Burr.
1394.

As the commerce of the country increased to an amazing degree, so the custom of lending money on bottomry became also very prevalent : and as the lenders had subjected themselves to great risks, they began to think it necessary to protect their property, by insuring to the amount of the money lent. In a former chapter, much was said of the mode by which insurances on such property were to be effected ; and we then saw from the case of *Glover v. Black*, that it was necessary to insert in the policy that the interest insured was bottomry or respondentia, and that such was the law and practice of merchants. From this case too it is evident, that when a person has insured a bottomry or respondentia interest, and he recovers upon the bond, he cannot also recover upon the policy : because he has not sustained a loss within the meaning of his contract ; and to suffer any man to receive a double satisfaction, would be contrary to the first principles of insurance law. As it is merely a contract of indemnity, a man shall never receive less ; nor can he be entitled to recover more than the amount of the damage he has, in fact, sustained.

CHAPTER THE TWENTY-SECOND.

Of Insurance upon Lives.

AN Insurance upon Life is a contract, by which the underwriter for a certain sum, proportioned to the age, health; profession, and other circumstances of that person, whose life is the object of insurance, engages that the person shall not die within the time limited in the policy: or if he do, that he will pay a sum of money to him in whose favour the policy was granted. Thus if *A.* lend 100*l.* to *B.* who can give nothing but his personal security for repayment: in order to secure him, in case of his death, *B.* applies to *C.* an insurer, to insure his life in favour of *A.* by which means, if *B.* die within the time limited in the policy, *A.* will have a demand upon *C.* for the amount of his insurance.

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1 Postlethw.
Dict. of Tr.
p. 150.
Vide the
Appendix,
No. 3.
2 Blac. Com
459.

The advantages resulting from such insurances are many and obvious: and most of them may be reduced under the following classes. To persons possessed of places or employments for life; to masters of families, and others, whose income is subject to be determined, or lessened, at their respective deaths; who, by insuring their lives, may secure a sum of money for the use of their families. To married persons, where a jointure, pension, or annuity, depends on both or either of their lives, by insuring the life of the persons entitled to such annuity, pension, or jointure. To dependents upon any other person, during whose life they are entitled to a salary or benefaction, and whose life being insured, will enable such dependents, at the death of their benefactor, to claim from the insurers a sum equal to the premium paid. To persons wanting to borrow money, who, by insuring their lives, are enabled to give a security for the money borrowed. These, and many other advantages, being so obvious, the Bishop of *Oxford*, Sir *Thomas Allen*, and some other gentlemen, were induced to apply to Queen *Anne* to obtain her charter for incorporating them and their successors, whereby they

1 Postlethw.
150.

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might provide for their families, in an easy and beneficial manner. Accordingly, in the year 1706, her majesty granted her royal charter, incorporating them by the name of "The Amicable Society for a perpetual Assurance Office," giving them a power to purchase lands, an ability to sue and be sued in their corporate capacity, and a common seal for the more easy and expeditious management of the affairs of the Company.

The benefits, which accrued to the public from this species of contract, were found to be so extensive, that another office was established by deed enrolled in the Court of King's Bench at *Westminster*, for the insurance of lives only. The name of this office is the "*society for equitable assurance on lives and survivorships*." Besides this, the two Companies of the *Royal Exchange* and *London Assurance*, obtained his majesty's charter, to enable them also to make insurance on lives. The charter points out the advantages of such institutions; for it states as the ground, on which such a permission is to be granted, "That it has been found by experience to be of benefit and advantage, for persons having offices, employments, estates, or other incomes, determinable on the life or lives of themselves or others, to make assurances on the life or lives, upon which such offices, employments, estates, or incomes are determinable (a)." Private underwriters also may enter into policies of this nature, as well as any other, provided the party, making the insurance, chuses to trust their single security.

(a) An act passed in the 39 *Geo. 3.* (ch. 83.) for incorporating a new insurance company, called *The Globe Insurance Company*, the second section of which authorizes them (among other things) to make insurances on the life or lives of any person or persons whomsoever; and to grant, purchase, and sell annuities for lives, or on survivorship, and grant sums of money, payable at future periods, within the kingdom of *Great Britain* or *Ireland*, and any other parts abroad, whether within his Majesty's dominions or not; and shall and may receive deposits of funds of tontine societies, and other institutions established for granting future advantages, and deposits of funds belonging to, and act as treasurer thereof for benefit or friendly societies, and other charitable and benevolent institutions; and make provision for the widows and children of the clergy, and for clergymen, and receive deposits from or on account of members of the industrious classes of society, and others; and to make provision for members of the industrious classes of society, and others, by allowing interest on such deposits made, or otherwise, upon such terms and conditions, and in such manner, as shall or may be agreed upon between the said corporation so to be created and established, and the persons and societies contracting with the said corporation, for the purposes thereinbefore mentioned.

The

The antiquity of this practice cannot be very easily ascertained; however, we find traces of it in some very old authors. In the *French* book, entitled *Le Guidon*, we find it mentioned, as a contract perfectly well-known, at that time, in other countries. The author of that book, however, tells us in the same passage, that it was a species of contract wholly forbidden in *France*, as being repugnant to good morals, and as opening a door to a variety of frauds and abuses. Such, indeed, the law of *France* continues at this day: and insurances upon lives are prohibited in other countries of *Europe* by positive regulation. The same *French* author has, however, gone a little too far in asserting, that the other countries, in which they had been till that time encouraged, were also obliged to forbid them. This had not certainly taken place at that time, as may be inferred from the 66th article of the laws of *Wijbuy*: and in *England* they never had been prohibited. The learned *Roccus* also takes notice of them as legal contracts, and quotes various authors in support of his opinion.

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Le Guidon,
c. 16 art. 5.
published in
1661.

a Valin, 54.

a Mag. 70.

Le Guid.
loc. cit.

Roccus de
Asses. Not.
74.

These insurances being thus sanctioned in *England* by royal authority, and the funds of the different societies having very much increased, and being fixed on a stable and permanent foundation, contracts of this nature became so much a mode of gambling (for people took the liberty of insuring any one's life, without hesitation, whether connected with him; or not, and the insurers seldom asked any question about the reasons, for which such insurances were made) that it at last became a subject of parliamentary discussion. The result of that discussion was, that a statute passed, by which it was enacted, "That no insurance should be made by any person or persons, bodies politick or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons, for whose use, benefit, or on whose account, such policies should be made, should have no interest or by way of gaming or wagering; and every insurance made, contrary to the true intent and meaning thereof, should be null and void to all intents and purposes." And in order more effectually to guard against any imposition or fraud, and to be the better able to ascertain, what the interest of the person, entitled to the benefit of the insurance, really was, it was further enacted, by the same statute, "that it should not be lawful

1 Mag. 33.

14 Geo. 3.
c. 43. l. 1.

Sec. 1.

- C H A P. " to make any policy or policies on the life or lives of any per-
 XXII. " son or persons, or other event or events, without inserting in
 " such policy or policies, the person's name interested therein,
 " or for whose use, benefit, or on whose account, such policy
 Sect. 3. " was so made or underwrote. And that in all cases where the
 " insured had an interest in such life or lives, event or events,
 " no greater sum should be recovered, or received from the in-
 " surer or insurers, than the amount or value of the interest of
 " the insured in such life or lives, or other event or events.
 Sect. 4. " That nothing in the act contained shall extend, or be con-
 " strued to extend, to insurances *bona fide* made by any person
 " or persons, on ships, goods, or merchandizes; but every such
 " insurance shall be as valid and effectual in law, as if this act
 " had not been made."

It has been held that a person, holding a note given for money won at play, has not an insurable interest in the life of the maker of the note.

Dwyer v.
Edie, Lond.
Sittings af-
ter Hil.
1788.

An action was brought on a policy on the life of *James Russell* from the 1st of *June* 1784 to the 1st of *June* 1785. *Russell* was warranted in good health, and by a memorandum at the foot of the policy it was declared that it was intended to cover the sum of 500*l.* due from *Russell* to the plaintiff, for which he had given his note payable in one year from the 14th of *May* 1784.—Two objections were made on the part of the defendant: 1st, That part of the consideration for the note was money won at play: 2dly, That *Russell* at the time he gave the note was an infant.

Mr. Justice *Buller* nonsuited the plaintiff upon the ground of part of the consideration of the note being for a gaming transaction; and therefore there was a want of interest in the plaintiff. But as to the other objection on account of infancy the interest must be contingent, for *Russell* might or might not avoid his note; and he doubted much whether till so avoided, the note must not be taken against a third person to be the note of an adult, for the maker of the note only could take the objection (*a*).

But

Comp. 737.

(a) There is a case of *Reebuck v. Hammerston*, in which a policy made, in order to decide upon the sex of a particular person, was held to fall within the prohibition of this Statute.

But a creditor has such an interest in the life of his debtor, that he may insure it, and recover upon the policy.—Thus in an action on a policy of insurance on the life of Lord *Newhaven* from the 1st of *December* 1792 to the 1st of *December* 1793, the only question made by the defendant was as to the plaintiff's interest, which it was contended was not sufficient to take this case out of the statute 14 *Geo.* 3. c. 48. It appeared in evidence that Lord *Newhaven* was indebted to the plaintiff and a Mr. *Mitchell* in a large sum of money, part of which debt had been assigned by them to another person; the remainder, being more than the amount of the sum insured, was upon a settlement of accounts between the plaintiff and *Mitchell*, agreed by them to remain to the account of *Mitchell* only.

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Anderson v.
Edie, B. R.
Lord, Sitt.
in Trinity
Term, 1795.

Lord *Kenyon* was of opinion, that this debt was a sufficient interest: and said, that it was singular, that this question had never been *directly* decided before. That a creditor had certainly an interest in the life of his debtor; the means by which he was to be satisfied may materially depend upon it, and at all events the death must in all cases in some degree lessen the security. Verdict for the plaintiff.

So also in a previous case, where an action was brought on a policy on the life of *William Holden* from the 17th *August* 1790 to *August* 1791, and during the life of the plaintiff; *Holden* had granted an annuity to the plaintiff's late brother, which annuity he had bequeathed to persons not parties to this insurance, having made the plaintiff executor of his will, and directed him to make assurance. Lord *Kenyon* thought this a sufficient interest in the executor to support the action. The cause proceeded, therefore: but the defendant had a verdict afterwards upon a different ground.

Tidswell v.
Angerstein,
Peck's
N. P. Cases,
151.

statute. In another case, a policy having been made, on the event of there being an open trade between *Great Britain* and the province of *Maryland*, on or before the 6th *July* 1778, Lord *Mansfield* said, that it was clear the plaintiff could not recover. 1st, Is this an interest within the act? It was made to prevent gambling policies. Every man in the kingdom has an interest in the events of war and peace; but I doubt whether that be an interest within the act. But, 2dly, The policy is void, by not having the name inserted according to the second section of the statute.

Moffet v.
Staples, Sitt.
at Guildhall,
Mich. Vac.
1778.

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But if after the death of the debtor, his executors pay the debt, the creditor cannot afterwards recover upon the policy, although the debtor died insolvent, and the executors were furnished with the means of payment from another quarter than the estate of their testator.

Godfall &
others v.
Boldero &
others,
9 East, 72.

This point was decided in an action brought by Messrs. Godfalls, coachmakers, against the directors of the Pelican Life Insurance Company, on a policy on the life of the late Right Honourable *Wm. Pitt*; and the declaration averred that the plaintiffs were interested in his life at the time of making the insurance, and till the time of his death to the amount of the sum insured. One of the pleas, and the material one stated, that the debt due to the plaintiffs was *after the death of Mr. Pitt, and before the exhibiting of the plaintiffs' bill*, fully paid to the plaintiffs by the Earl of *Chatham* and the Lord Bishop of *Lincoln*, executors of the will of *Mr. Pitt*. Issue was taken on the fact of payment by the executors. Upon the trial of this cause before Lord *Ellenborough* a case was reserved for the opinion of the Court, stating that *Mr. Pitt* died on the 23d *January* 1806; that the defendants were served before Trinity Term with process issued on the 3d *June* 1806: that *Mr. Pitt*, at the time of the execution of the policy, was indebted to the plaintiffs, and continued so till his death in upwards of 500*l.* the sum insured, and died insolvent. That on the 6th *March* 1806, the executors of *Mr. Pitt* paid to the plaintiffs, out of the money granted by parliament for the payment of *Mr. Pitt's* debts, 110*g**l.* as in full for the debt due to them from *Mr. Pitt*. After argument at the bar, and time taken to deliberate, the judgment of the Court was pronounced by

Lord *Ellenborough*.—"This was an action of debt on a policy of insurance on the life of the late *Mr. Pitt*, effected by the plaintiffs, who were creditors of *Mr. Pitt* for the sum of 500*l.* The defendants were directors of the Pelican Life Insurance Company, with whom that insurance was effected. (His Lordship, after stating the pleadings and the case, proceeded.)—This assurance, as every other to which the law gives effect, (with the exceptions only contained in the 2d and 3d sections of the stat. 19 *Geo. 2. c. 37.*) is in its nature a contract of indemnity, as distinguished

distinguished from a contract by way of *gaming* or *wagering*. The interest, which the plaintiffs had in the life of Mr. Pitt, was that of creditors, and the probability of loss which resulted from his death. The event, against which the indemnity was sought by this assurance, was substantially the expected consequence of his death, as affecting the interest of these individuals assured in the loss of their debt. This action is in point of law founded on a supposed damnification of the plaintiff, occasioned by his death, existing, and continuing to exist at the time of the action brought: and being so founded, it follows of course, that if, before the action was brought, the damage, which was at first supposed likely to result to the creditors from the death of Mr. Pitt, were wholly obviated and prevented by the payment of his debt to them, the foundation of any action on their part, on the ground of such insurance, fails. And it is no objection to this answer, that the fund out of which their debt was paid did not (as was the case in the present instance,) originally belong to the executors, as the part of assets of the deceased: for though it were derived *aliunde* the debt of the testator was equally satisfied by them thereout; and the damnification of the creditors, in respect of which their action upon the assurance contract is alone maintainable, was fully obviated before their action was brought. This is agreeable to the doctrine of Lord Mansfield in *Hamilton v. Mendes*, 2 Burr. 1210. The words of Lord Mansfield are, "The plaintiff's demand is for an indemnity: his action then must be founded upon the nature of the damnification, as it really is at the time the action is brought. It is repugnant, upon a contract for indemnity, to recover as for a total loss, when the event has decided that the damnification in truth is an average, or perhaps no loss at all. Whatever undoes the damnification in the whole, or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms to bring an action for indemnity where, upon the whole event, no damage has been sustained." Upon this ground, therefore, that the plaintiffs had in this case no subsisting cause of action in point of law, in respect of their contract, regarding it as a contract of indemnity, at the time of the action brought, we are of opinion that a verdict must be entered for the defendants on the first and third pleas, notwithstanding the finding in favour of the plaintiffs on the second plea."

The

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The remaining observations and rules upon this subject are very few and short: because those general rules and maxims, upon which so much has been said with regard to insurances in general, are also applicable to this species of them: the same mode of construction is to be adopted: fraud will equally affect the one as the other; the same attention must be paid to a rigid compliance with warranties; and the same rules of proceeding are to be followed.

Aveson v.
Lord Kin-
nerd.
6 East. 189.

It lately became a question, in an action by a husband on a policy on the life of his wife, whether the declarations of the wife as to her state of health, then lying in bed apparently ill, describing the bad state she was in, at her going to M. (whither she went to be examined by the surgeon preparatory to the insurance being made) down to that time, and her fear that she could not live 10 days longer when the policy would be returned, were admissible in evidence. It was held they were.

Vide the
Appendix,
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With respect to the risk, which the underwriter is to run, this is usually inserted in the policy; and he undertakes to answer for all those accidents to which the life of man is exposed unless the *cessuy que vie* put himself to death, or he die by the hand of justice. The policy, as to the risk, generally runs in these words: "The said insurers, in consideration of the sum paid, do assure, assume, and promise, that the said A. B. shall, by the permission of Almighty God, live and continue in this natural life for and during the said term, or in case he the said A. B. shall, during the said time, or before the full end and expiration thereof, happen to die by any ways or means whatsoever, suicide or the hands of justice excepted, then," &c. We see, that this contract expressly says, the death must happen within the time limited, otherwise the insurers are discharged. But suppose a *mortal wound* is received during the existence of the policy, and the person languishes till after the term limited in the contract, what says the law? Agreeably to the decision of this point, in cases of marine insurances, not only the cause of the loss, but the loss itself, must actually happen, during the time named in the policy, otherwise the insurers are not responsible. This very case was put by Mr. Justice *Willes*, in his argument, when delivering the opinion of the court,

Vide ante,
c. 2. p. 47.

court, in the case of *Lockyer v. Offley*. Suppose, said the learned judge, an insurance upon a man's life for a year, and some short time before the expiration of the term, he receive a mortal wound, of which he dies after the year, the insurer would not be liable.

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Vide *supra*,
p. 43.

But when an insurance is made upon a man's life, who goes to sea, and the ship in which he sailed was never afterwards heard of, the question, whether he did or did not die within the term insured, is a fact for the jury to ascertain from the circumstances which shall be produced in evidence.

Thus in an action on a policy of insurance on the life of *L. Maclean* Esq. from the 30th of *January* 1772 to the 30th of *January* 1778, it appeared in evidence that about the 28th of *November* 1777, *Maclean* sailed from the *Cape of Good Hope*, in the *Swallow* sloop of war, which ship, not being afterwards heard of, was supposed to have been lost in a storm off the *Western Islands*. The question was, Whether *Maclean* died before the 30th of *January* 1778? In order to establish the affirmative of that question, the plaintiff called witnesses to prove the ship's departure from the *Cape* with *Maclean*; and several captains swore that they sailed the same day; that the *Swallow* must have been as forward in her course as they were on the 13th or 14th of *January*, the period of a most violent storm, in which she probably was lost. That the *Swallow* was much smaller than their vessels, which, with difficulty, weathered the storm.

Patterson v.
Black. St.
at Guildhall,
Hil. Vac.
1780.

Lord Mansfield left it to the jury, whether, under all the circumstances, they thought the evidence sufficient to convince them that *Maclean* died before the expiration of the time limited in the policy; adding, that if they thought it so doubtful as not to be able to form an opinion, the defendant ought to have their verdict. The jury found for the plaintiff.

These insurances, when a loss happens upon them, must be paid according to the tenor of the agreement, in the full sum insured, as this sort of policy, from the nature of it, being on the life or death of man, does not admit of the distinction between total and partial losses.

Lex Merc.
Red. 4th ed.
p. 294.

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We have seen that private persons, as well as the public companies, may be underwriters upon policies on lives; and as they frequently became bankrupts after the policy was underwritten, but before a loss happened, it became a question, Whether the persons interested in such insurances could claim the money, and prove the debt, under the commission, as if the loss had happened before it issued. In the chapter immediately preceding this, and in one prior to that, we took occasion to observe, that in order to remedy an inconvenience of this nature with respect to marine insurances and bottomry bonds, a statute had passed allowing creditors, either on such policies, or bottomry and respondentia bonds, to prove their debts under the commission, as if the loss or contingency had happened prior to that event. But as the words of the preamble to that section of the statute were special, referring only to insurances on ships, and goods, or contracts of bottomry, it was doubtful whether it extended to insurances on lives, although the words of the enacting part were very general, namely, "the assured in *any policy of assurance*," &c. In support of this doubt it was urged, that great inconveniences would follow from extending the statute to these policies, because the risk may remain unsettled for a long and indefinite number of years. The court, however, held, that the general words of the enacting part were not restrained by the preamble.

Cox v. Liotard, B. R. Hil. 24. G. 3. Dougl. Rep. p. 166. note.

This doctrine was laid down in an action on a policy of insurance on the life of *J. H. Byrd*, lately gone to the *East Indies*, on the event of his dying between the 5th of *April* 1780, and the 5th of *April* 1783. The defendant pleaded; 1st, Bankruptcy generally; and that the cause of action accrued before the bankruptcy: 2dly, That the policy was made prior to the time of his becoming a bankrupt, then the trading, petitioning creditor's debt, commission, proceedings, and certificate were specially set out, and that he was thereby discharged from the said policy, and all debts due at the time of the bankruptcy, without saying, that the cause of action accrued before the bankruptcy. To this last plea there was a general demurrer.

Lord Mansfield.—"The only question is, whether the enacting words of this statute, which are *general*, shall be restrained by the *preamble*, which is *particular*. I think they should not be restrained. The enacting clause comprehends *all* insurances and

and consequently insurances upon lives. This is exactly the case of *Pattison v. Banks* (a); for there the preamble was particular, but the enacting clause was general." C H A P.
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Mr. Justice *Willes* and Mr. Justice *Ashburft* concurred.

Mr. Justice *Buller*.—"In the case of *Mace v. Cadell*, it was held, that the enacting words of the statute of the 21st of *Ja.* 1. c. 19. were not restrained by the preamble (b). The inconveniences that have been urged, are not so great as are apprehended; for the creditors need not be delayed in their dividend. When a creditor has an insurance of this kind, he has nothing to do but lay to it before the commissioners, who will make a calculation, and lay aside as much as will give him a dividend equal to that of the other creditors. There must be judgment for the defendant."

It became a doubt in the reign of King *William*, when a policy on a life was to run from the day of the date thereof, till that day twelvemonth, and the person died on the day named, whether the insurer was liable. The court held that he was. The case was this: A policy of insurance was made to insure the life of Sir *Robert Howard* for one year, from the day of the date thereof; the policy was dated on the 3d day of *September* 1697. Sir *Robert* died on the 3d of *September* 1698, about one

Sir Robert
Howard's
case, 2 Salk.
625. 1 Ld.
Raymond,
480. S. C.

(a) The question in *Pattison v. Banks*, (*Cowp. Rep.* 540.) arose upon the 7 *Geo.* 1. c. 31. which allowed persons, who had given credit on bills, bonds, notes, and other securities, payable at a future day, and which were not payable at the bankruptcy of the debtor, to prove them under the commission. The preamble to the statute speaks of securities only for the sale of goods and merchandizes; but as the enacting words were general, the court held, that they extended to a bond for the payment of an annuity for a term of years.

(b) The statute of *James* enacts, "that if any person, at such time as he shall become bankrupt, shall, by the consent of the true owner, &c. have in his possession, &c. any goods, &c. whereof he shall be reputed owner; the commissioners shall have power to sell the same in like manner as any other part of the bankrupt's estate." The preamble says, "whereas it often happens that many persons before they become bankrupts, do convey their goods to other men, upon good consideration, and yet retain the possession, and are reputed owners thereof," &c. The court, in *Mace v. Cadell* (*Cowp.* 232.), held, that the statute extended to the goods of a third person, which he allowed the bankrupt to keep possession of, as well as to those which originally belonged to the bankrupt, although the statute speaks only of the bankrupt's original property.

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o'clock in the morning. Lord *Holt* held that from the day of the date excludes the day, but from the date includes it (a); so that the day of the date must be excluded here, and the underwriter is liable.

Vide the
Appendix,
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Although from a perusal of the note below, it will appear that no difficulty could occur on such a point at the present day; yet it is usual, in order to prevent disputes, to insert in the modern policies "*the first and last days included.*"

Vide ante,
284.

Policies on lives are equally vitiated by fraud or falsehood, as those on marine insurances; because they are equally contracts of good faith, in which the underwriter, from necessity, must rely upon the integrity of the insured for the statement of circumstances. Indeed, the case of *Wittingham v. Thornborough*, which we took the occasion to cite in support of the doctrine laid down in the chapter upon fraud in Marine insurances, was a policy upon a life insurance.—In another case, the principles of fraud were considered as far as it affects this contract.

Stockpole v.
Simon, Sitt.
in Guildhall,
Bilney Vac.
1779

It was an action on a policy of insurance for 150*l.* at four guineas *per cent.* in case *Drury Sheppey* should die at any time between the 1st of *April* 1777 and the 1st of *Apr'l* 1778, both days included, and during the life-time of *John Sheppey*, the father of *Drury*: but in case the said *John* should die before the said *Drury*, the policy to be void; the question was, as to the representation of the life at the time of the insurance. The interest in the insurance was 900*l.* due from *Drury Sheppey* to the plaintiff. It was admitted, that the life expired within the time limited in the policy. *Drury Sheppey* had a place in the Custom-house of *Ireland*, and was in bad circumstances. He went to

(a) In the law books, not perhaps much to the honour of the profession, this distinction taken by Lord *Holt* was at one time held to be law, at others not: sometimes, these expressions were held to mean the same thing; at others to be quite different. In the year 1777, however, this glaring absurdity was entirely done away, and the Court of King's Bench unanimously held, after much deliberation, that they mean the same thing; and they shall either be exclusive or inclusive, according to the context and subject matter, and shall be so construed as most effectually to support the deeds of the parties, and not to destroy them. See Lord *Mansfield's* very elaborate argument upon this occasion, in which all the cases are fully stated and considered. *Fugh v. The Duke of Leeds*, *Crompton's Reports*, 714.

the South of *France* for the benefit of his health, or to avoid his creditors, and there died. The broker, who effected the policy, told the underwriters that the gentleman, for whom he acted, would not warrant, but from the account he (the broker) had received, *he believed it to be a good life.*

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Lord *Mansfield*.—"As to the interest, this policy may be considered as a collateral security for the debt due to the plaintiff. Where there is no warranty, the underwriter runs the risk of its being a good life or not. If there be a concealment of the knowledge of the state of the life, it is a fraud. It is a rule that every subsequent underwriter gives credit to the representation made to the first; and it is allowed that any subsequent underwriter may give in evidence a misrepresentation to the first. The broker here does not pretend to any knowledge of his own, but speaks from *information*. There is no fraud in him." There was a verdict for the plaintiff.

Even where there is an express warranty, that the person is in good health, it is sufficient that he is in a reasonable good state of health; for it never can mean, that the *cestui que vie* is perfectly free from the seeds of disorder. Nay, even if the person, whose life was insured, laboured under a particular infirmity, if it can be proved by medical men, that it did not at all, in their judgment, contribute to his death, the warranty of health has been fully complied with; and the insurer is liable.

Thus in an action on a policy made on the life of Sir *James Ross* for one year, from *October 1759* to *October 1760*, warranted in good health at the time of making the policy: the fact was, that Sir *James* had received a wound at the battle of *La Feldt* in the year 1747, in his loins, which had occasioned a partial relaxation or palsy, so that he could not retain his urine or *feces*, and which was not mentioned to the insurer. Sir *James* died of a malignant fever within the time of the insurance. All the physicians and surgeons, who were examined for the plaintiff, swore, that the wound had no sort of connection with the fever; and that the want of retention was not a disorder, which shortened life, but he might, notwithstanding that, have lived to the com-

Ross v. Bradshaw,
1 Blac. Rep.
p. 312.

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mon age of man : and the surgeons who opened him, said, that his intestines were all found. There was one physician examined for the defendant, who said, the want of retention was paralytick ; but being asked to explain, he said, it was only a local palsy, arising from the wound, but did not affect life : but on the whole he did not look upon him as a good life.

Lord Mansfield.—“ The question of fraud cannot exist in this case. When a man makes insurance upon a life generally, without any representation of the state of the life insured, the insurer takes all the risk, unless there was some fraud in the person insuring, either by his suppressing some circumstances, which he knew, or by alleging what was false. But if the person insuring knew no more than the insurer, the latter takes the risk. In this case there is a warranty, and wherever that is the case, it must at all events be proved, that the party was a good life, which makes the question on a warranty much larger than that on fraud. Here it is proved that there was no representation at all, as to the state of life, nor any question asked about it : nor was it necessary. Where an insurance is upon a representation, every material circumstance should be mentioned, such as age, way of life, &c. But where there is a warranty, then nothing need be told ; but it must in general be proved, if litigated, *that the life was, in fact, a good one, and so it may be, though he have a particular infirmity.* The only question is, *Whether he was in a reasonable good state of health, and such a life as ought to be insured on common terms ?* The jury, upon this direction, without going out of court, found a verdict for the plaintiff.

WILKES v.
Poole, Sitt.
at Guildhall,
Easter Vac.
1780.

In a subsequent case, the same rule of decision was recommended and enforced. It was an action on a policy on the life of Sir Simeon Stuart Bart. from the 1st of April 1779 to the 1st of April 1780, and during the life of *Eliza Edgely Ewer*. This policy contained a warranty that Sir Simeon was about 57 years of age, and in good health on the 11th of May 1779, and that Mrs. Ewer was about 78 years of age. The defendant at the trial admitted, that Sir Simeon and Mrs. Ewer were of the respective ages mentioned in the warranty ; that he died before the 1st of April 1780, and that she was living. Two questions were in-

intended to have been made; 1st, As to the plaintiff's interest: 2d, On the warranty of health. The former was disposed of by the plaintiff having proved a judgment debt. As to the latter, it appeared in evidence, that, although Sir *Simeon* was troubled with spasms and cramps from violent fits of the gout, he was in as good health, when the policy was underwritten, as he had been for a long time before. It was also proved by the broker, who effected the policy, that the underwriters were told, that Sir *Simeon* was subject to the gout. Dr. *Heberden* and other gentlemen of the faculty were examined, who proved that spasms and convulsions were symptoms incident to the gout.

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Lord *Mansfield*.—"The imperfection of language is such that we have not words for every different idea; and the real intention of parties must be found out by the subject matter. By the present policy, the life is warranted, to some of the underwriters *in health*, to others *in good health*; and yet there was no difference intended in point of fact. *Such a warranty can never mean that a man has not the seeds of a disorder.* We are all born with the seeds of mortality in us. A man, subject to the gout, is a life capable of being insured, if he has no sickness at the time to make it an unequal contract." There was a verdict for the plaintiff."

In a former chapter we saw, that when the risk is entire, and it is once begun, there shall be no apportionment or return of premium, though it should cease the very next day after it commenced. The same rule is applicable in every respect to the premium on life insurances; for the contract is entire, and if the person whose life is insured should put an end to it the next day after the risk commences, though the underwriter is discharged, there would be no return of premium. This has never been decided in any judicial determination expressly on the point, but it has frequently been declared to be the law upon the subject by the learned judges in the course of argument, when return of premium on marine insurances was the point under discussion. This was particularly done in the case of *Tyrre v. Fletcher*, by Lord *Mansfield*, when delivering the judgment of the court. "There has been an instance put," said his Lordship, "of a policy where the measure is by time, which seems to me

Vide ante,
c. 19.

Cowp. 669.

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“ to be very strong and apposite to the present case ; and that is
 “ an insurance upon a man’s life for twelve months. There
 “ can be no doubt but the risk there is constituted by the mea-
 “ sure of time, and depends entirely upon it : for the under-
 “ writer would demand double the premium for *two* years, that
 “ he would take to insure the same life for one year only. In
 “ such policies, there is a general exception against suicide. If
 “ the person puts an end to his own life the next day, or a month
 “ after, or at any other period within the twelve months, there
 “ never was an idea in any man’s breast, that part of the pre-
 “ mium should be returned.”

Doug. 789. Afterwards in the case of *Bermon v. Woodbridge*, Lord Mans-
field laid down the same doctrine. “ In an insurance upon a
 “ life, with the common exception of suicide, and the hands of
 “ justice, if the party is executed, or commit suicide, in twenty-
 “ four hours, there shall be no return.”

From these opinions, which have been frequently repeated in
 other cases, the law upon the subject of return of premium, as
 applicable to life insurances, seems perfectly ascertained: because,
 except in the case of suicide or a public execution, the question
 can never arise.

CHAPTER THE TWENTY-THIRD.

Of Insurance against Fire.

AN insurance of this sort is a contract, by which the insurer, in consideration of the premium which he receives, undertakes to indemnify the insured, against all losses, which he may sustain in his house, or goods, by means of fire, within the time limited in the policy. To enter upon a detail of the various advantages, which mankind have derived from this species of contract, would be a waste of time; because they are obvious to every understanding. As little does it fall within the compass of my plan, to enumerate the various offices, that have been instituted for the purpose of insuring property against fire; or the rules and regulations, by which they are severally governed. Some of them have been instituted by royal charter; others by deed enrolled; and others give security upon land for the payment of losses. The rules, by which these societies are governed, are established by their own managers, and a copy given to every person at the time he insures; so that, by his acquiescence, he submits to their proposals, and is fully apprized of those rules upon the compliance or non-compliance with which he will or will not be entitled to an indemnity.

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See r H.
Blackst.
254.

The construction to be put upon those regulations has but seldom become the subject of judicial enquiry; few instances only having occurred in our researches upon this occasion. In the proposals of the *London Assurance Company*, and some of the other offices, there is a clause by which it is provided, that they do not hold themselves liable for any loss or damage by fire, happening by any invasion, foreign enemy, or any military or usurped power whatsoever. It became a question, what species of insurrection should be deemed a military or usurped power within the meaning of this proviso. It was held by the court of Common Pleas against the opinion of Mr. Justice Gould, that it could only mean to extend to houses set on fire by means of an invasion from abroad, or of an internal rebellion, when armies are employed to support it.

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Drinkwater
v. the Cor-
poration of
the London
Assurance,
a Will. 363.

The case in which this question arose, was an action of covenant against the defendants upon a policy of insurance of a malting office of the plaintiff at *Norwich* from fire, in which policy there was a proviso that the corporation should not be liable in case the same shall be burnt by any invasion by foreign enemies, or any military or usurped power whatsoever, and that the defendants had not kept their covenants, to the plaintiff's damage. The defendants plead first the general issue, that they have not broke their covenants, and thereupon issue is joined. 2dly, They plead that it was burnt *by an usurped power*; the plaintiff replies, that it was not burnt *by an usurped power*, and thereupon issue is also joined. This cause was tried at *Norwich* assizes; a verdict was given for the plaintiff, and 469*l.* damages, subject to the opinion of the court, upon the following case, viz. That upon *Saturday* the 27th of *November*, a mob arose at *Norwich* upon account of the high price of provisions, and spoiled and destroyed divers quantities of flour; thereupon the proclamation was read, and the mob dispersed for that time. Afterwards another mob arose, and burnt down the malting office in the policy mentioned. The question is, Whether the plaintiff is entitled to recover in this action? This case was twice argued at the bar, and the court took time to deliberate; after which, as the judges differed in opinion, they delivered their opinions *seriatim*.

Mr. Justice *Gould* was of opinion, that the malting office being burnt by the mob, who rose to reduce the price of provisions, the same was burnt by an *usurped power*, within the true intent and meaning of the proviso in the policy: to shew that it was an usurped power for any person to assemble themselves, to alter the laws, to set a price upon victuals, &c. he cited *Popham*, 122. where it is agreed by the justices, that to attempt such a thing by force is felony, if not treason; and therefore judgment ought to be for the defendant.

Mr. Justice *Batbush*.—"The words, "*usurped power*," in the proviso, according to the true import thereof, and the meaning of the parties, can only mean an invasion of the kingdom by foreign enemies to give laws and usurp the government thereof, or an internal armed force in rebellion, assuming the power of government by making laws, and punishing, for not obeying those laws. The plea alleges that the malting office was burnt

by an *usurped power* unlawfully exercised, but does not charge *that* usurped power as a rebellion; that a mob arose at *Norwich* on account of the price of victuals, and as soon as the proclamation was read, they dispersed; therefore judgment ought to be for the plaintiff."

Mr. Justice *Clive*.—"The words must mean such an usurped power as amounts to high treason, which is settled by the 25th of *Edward Third*. The offence of the mob in the present case was a felonious riot, for which the offenders might have suffered; but it cannot be said to be an usurped power; therefore I am of opinion that judgment should be given for the plaintiff."

Lord Chief Justice *Wilmot*.—"Upon the best consideration I am able to give this case, I am of opinion, that the burning of the malting office, was not a burning by an *usurped power* within the meaning of the proviso. Policies of insurance, like all other contracts, must be construed according to the true intention of the parties. Although the counsel on one side said, that policies ought to be construed liberally; on the other side, that they ought to be construed strictly; in a doubtful case, I think the turn of the scale ought to be given against the speaker, because he has not fully and clearly explained himself. The imperfection of language to express our ideas is the occasion that words have equivocal meanings; and it is often very uncertain what the parties to a contract in writing mean. When the ideas are simple, words express them clearly; but when they are complex, difficulties often arise: and men differ much about the ideas intended to be conveyed by words: In the present case, what is the true idea conveyed to the mind by the words *usurped power*? The rule to find it out is to consider the words of the context, and to attend to the popular use of the words, according to *Horace*, *Arbitrium est, et jus, et norma loquendi*. My idea of the words, *burnt by an usurped power*, from the context is, that they mean burnt or set on fire by occasion of an invasion from abroad, or of an internal rebellion, when armies are employed to support it, when the laws are dormant and silent, and firing of towns are unavoidable; these are the outlines of the picture drawn by the idea, which these words convey to my mind. The time of the incorporation of this society of the *Lon-*

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don Assurance Company, was soon after a rebellion in this kingdom, and it was not so romantic a thing to guard against fire by rebellion, as it might be now ; the time, therefore, is an argument with me that this is the meaning of these words. Rebellious mobs may be also meant to be guarded against by the proviso, because this corporation commenced soon after the riot act ; and if common mobs had been in their minds, they would have made use of the word *mob*. The words "*usurped power*," may have a great variety of meanings according to the subject matter where they are used, and it would be pedantic to define the words in their various meanings ; but in the present case, they cannot mean the power used by a common mob. It has not been said, that if one, or fifty persons had wickedly set this house on fire, that it would be within the meaning of the words *usurped power*. It has been objected that here was an *usurped power* to reduce the price of victuals, but this is part of the power of the crown ; and therefore it was an *usurped power* : but the king has no power to reduce the price of victuals. The difference between a rebellious mob, and a common mob, is, that the first is high treason ; the latter a riot or a felony. Whether was this a common or a rebellious mob ? The first time the mob rises, the magistrates read the proclamation, and the mob disperses ; they hear the law, and immediately obey it. The next day another mob rises on the same account, and damages the houses of two bakers ; thirty people in fifteen minutes put this army to flight, they were dispersed and heard of no more. Where are the *species belli* which Lord *Hale* describes ? This mob wants an universality of purpose to destroy, to make it a rebellious mob, or high treason. 1 *Hale's P. C.* 135. There must be an universality, a purpose to destroy *all* houses, *all* inclosures, *all* bawdy houses, &c. Here they fell upon two bakers and a miller, and the mob chastized these particular persons to abate the price of provisions in a particular place : this does not amount to a rebellious mob. When the laws are executed with spirit, mobs are easily quelled ; sometimes a courageous act done by a single person will quell and disperse a mob. And sometimes the wisdom of an individual will do the same, as is thus beautifully described by *Virgil*,

*Ac veluti magno in populo cum saepe coorta est
Seditio, saevitque animis ignobile vulgus,*

Jamque

*Jamque fates et saxa volant : furor arma ministrat.
 Tum pietate gravem, ac meritis, si sorte virum quæm
 Conspexere, silent, erectisque auribus adstant :
 Ille regit dictis animos, et pectora mulcet.*

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But amongst armies, the laws are silenced, and the wisdom or courage of an individual will signify nothing. Upon the whole, I am of opinion, that there must be judgment for the plaintiff : and accordingly the *posse* was ordered to be delivered to the plaintiff, by three judges against one.

The Sun Fire Office has used words of a larger and more extensive import than those, which were the subject of discussion in the last case ; for the proprietors of that company declare, that they will not pay any loss or damage by fire, happening by any invasion, foreign enemy, *civil commotion*, or any military or usurped power whatsoever. A case has unfortunately arisen, in which the meaning of these words, *civil commotion*, has been the subject of judicial enquiry.

An action was brought on a policy of insurance to recover from the Sun Fire Office a satisfaction for damage done to the plaintiff's houses and goods by the rioters, who, it is very well known, and history will inform posterity, in June 1780, to the terror and dismay of the inhabitants of London, traversed that city for several days burning and destroying *Roman Catholic* chapels, public prisons, and the houses of various individuals ; the ostensible purpose of their assembling being to procure the repeal of a wise and humane law, (which had passed for some indulgencies to *Roman Catholics*,) and who were at last only dispersed by military force. As the circumstances of these riots were very recent, they were not minutely gone into at the trial. It was, however, sufficiently proved, that the plaintiff, on account of his religion, (being a *Roman Catholic*), had been, amongst others, selected as an object of the rage of the times, and that his houses and effects were set on fire. The office defended this action, considering that they were protected by the article just recited, namely, "That they would not answer for any loss, occasioned by an invasion, foreign enemy, *civil commotion*, or any military or usurped power whatever." This point was argued much at length by the counsel on both sides.

Langdale v. Mason and others, Sitt. at Guildhall, Mich. Vac. 1780.

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Lord Mansfield.—“ Gentlemen of the jury, this is an action brought by the plaintiff against the defendants upon the policy of insurance mention'd in the pleadings, for the value of property, which was consumed by fire. Most undoubtedly, every man's leaning must be to the side of the plaintiff, in order to divide the loss in so great a calamity. But that leaning must be governed by rules of law and justice : and the only question that arises for your determination and that of the court, is singly upon the construction of two words in the policy. It will be necessary, in order to investigate this matter, to go into the history, which has been opened and explained to you, of other insurance policies. In the year 1720, the *London Assurance Company* put into their policies all the words here used, except *civil commotion*. Whatever fire happens by a foreign enemy is clearly provided against : when they burn houses, or set fire to a town, that is also provided for. What is meant by military or usurped power? They are ambiguous ; and they seem to have been the subject of a question and determination. They must mean rebellion, where the fire is made by authority : as in the year 1745, the rebels came to *Derby*, and if they had ordered any part of the town, or a single house to be set on fire, that would have been by authority of a rebellion. That is the only distinction in the case—it must be by rebellion got to such a head, as to be under authority. In the year 1726, some years after the *London Assurance Company* had done it, the *Sun Fire office* put in the exception ; and in 1727, they put in other words : they do not keep to the form of the *London Assurance* : they do not say by invasion from foreign enemies merely : they clearly provide against rebellion, determined rebellion, with generals who could give orders. Though this be so guarded, the *Sun Fire Office* did not think it answered their purpose ; and therefore they took the words *civil commotion*. Not only using those words, applicable to guard against a foreign enemy, against a rebellion, where there are officers and leaders, that can give authority and power ; but they add other words, as general and untechnical as can possibly be used : *civil commotion*, not civil commotion that amounts to *high treason*. They avoid saying civil commotions that amount to felony ; they avoid saying civil commotions that amount to *misdemeanors* : but they use a general expression “ if the mischief happens from a civil commotion,” taking the largest and most general sense of the words that the language will allow : they

do not even say a *riot*. It may be a question in point of law, whether an assembly or multitude be a riot. In that case, they do not say committing a felony, but speak of fire occasioned by civil commotion. The single question is, Whether this has been a civil commotion? If there be a case to which these words can be applicable, it is to a case of this sort. I cannot see any of the other words, to which it can be applied. Usurped power takes in rebellion, acting by usurped powers amongst themselves. From a foreign enemy the office is secured. But what is a civil commotion? It is something else. The present was an insurrection of the people resisting all law, setting the protection of the government at nought, taking from every man, who was the object of their resentment, that protection, as appears from the evidence given by the witnesses upon the facts, and which you all know as well as if no witnesses had been produced. What was the object and end of this violent insurrection? It took place in many parts of the town at the same time, and the very same night; the mob were in *Broad street*, *St. Catharine's*, in *Colman-street*, at *Blackfriar's Bridge*, and at the plaintiffs. What is the object? *General destruction, general confusion*. It certainly was meant to aim at the very vitals of the constitution. It was not a private matter, under the colour of *popery* only, to destroy all Papists under a pretence or a cry of *No popery*. But the general object was *destruction* and *confusion*. The Fleet Prison was burnt down: Newgate was burnt down the night before. The King's Bench Prison is burnt, and all the prisoners set at liberty. The new Bridewell is burnt: the Bank attacked: consider the consequences, if they had succeeded in destroying the Bank of *England*. The Excise and Pay Offices in *Broad street* were threatened. Military resistance, and an extraordinary stretch were made and justified by necessity. There was a great deal of firing, many men were killed; and the houses of a vast number of Papists were burnt and destroyed. What is this but a *civil commotion*? No definition has been attempted to be given of what it is. It is said, that this is a civil commotion distinct from usurped power and rebellion. It is admitted that this kind of insurrection may amount to high treason: and, to be sure, it may. But the office do not put their expectation upon trying, whether they were guilty of high treason or not. There is no manner of doubt, that this was an insurrection for a grand purpose, to take from a set of men the protection of the law,

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law. That is levying war against the king; there is not any doubt of it. It is not put upon that, but on the ground of a civil commotion. It is not an occasional riot, that would be another question. I do not give any opinion what that might be. You will give your opinions, whether the facts of this case bring it within the idea of a civil commotion. I think a civil commotion is this; an insurrection of the people for general purposes, though it may not amount to a rebellion, where there is an usurped power. If you think it was such an insurrection of the people for the purposes of general mischief, though not amounting to a rebellion, but within the exception of the policy, you will find for the defendants. If not, you will find for the plaintiff." The jury, agreeably to the Chief Justice's direction, found for the defendants." (a).

See the
printed propo-
sals of the
different
Fire Offices.

When a fire happens, and the party sustains a loss in consequence of it, he is bound by the printed proposals of most of the societies, to give immediate notice thereof to the office in which he is insured; and as soon as possible afterwards, or within a li-

Tarleton
and others v.
Stainforth,
5 Term.
Rep. 695.
This judg-
ment was
afterwards
affirmed in
the Ex-
chequer-
chamber,
1 Bos. &
Pull. 471.

(a) In a policy of insurance against loss by fire from half a year to half a year, the insured agreed to pay the premium half-yearly "as long as the assurers should agree to accept the same, within 15 days after the expiration of the former half year;" and it was also stipulated that no insurance should take place till the premium was actually paid; a loss happened within 15 days after the end of one half year, but before the premium for the next was paid; and it was held that the assurers were not liable, though the assured tendered the premium before the end of the 15 days, but after the loss.

The defendants in the above case were members of a society at Liverpool, for the insurance of property from fire: but soon after the decision, the Royal Exchange Assurance Company, the Phoenix, and some other Insurance Companies, gave notice that they did not mean to take advantage of the judgment so pronounced, but would hold themselves liable for any loss during the 15 days that were allowed for the payment of the insurance upon annual policies, and all other policies of a longer period. But that policies for a shorter period than a year would cease at six o'clock in the evening of the day mentioned in the policy. Still, in a subsequent case against the Sun Fire Office, which had advertised, the Court held, notwithstanding this advertisement, the assured having had notice, before the expiration of the year, to pay an increased premium for the year ensuing, otherwise they would not continue the insurance, which the assured refused, that the office was not liable for a loss which had happened within 15 days from the expiration of the year, for which the insurance had been made, though the assured, after the loss and before the 15 days expired, tendered the full premium, which had been demanded, the court being of opinion that the effect of the whole contract was only to give the assured an option to continue the assurance or not during 15 days after the expiration of the year, by paying the premium for the year ensuing, notwithstanding an intervening loss, provided the office had not, before the end of the year, determined the option, by giving notice that they would not renew the contract upon the same terms.

mitted

mitted time according to the regulations of some, to deliver in as particular an account of his loss, or damage, as the nature of the case will admit; and make proof of the same, by his oath or affirmation, by books of accounts, or such other vouchers as shall be required, or as shall be in existence. It is also necessary that the insured should procure a certificate under the hands of the ministers and churchwardens, together with some other reputable inhabitants of the parish, not concerned in such loss, importing, that they are well acquainted with the character and circumstances of the sufferer or sufferers; and do know, or verily believe, that he, she, or they, have really, and by misfortune sustained by such fire the loss and damage therein mentioned (a). When any loss is settled and adjusted, the sufferers are to receive immediate satisfaction, without any deduction.

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In the *Lex Mercatoria* it is said, that policies on houses and lives admit of no *average*. That this is true of the latter cannot be denied, as we have already shewn in the preceding chapter; because the payment of the whole sum depends upon one single event, which must *wholly* happen, or not at all. But that it cannot be true of insurances against fire either of houses or goods is equally clear; for houses may be *partially* damaged, and goods may be *partially* destroyed. In which case, as insurance is a contract of indemnity, the end of the contract is answered by putting the party in the same situation in which he was before the accident happened. But if he were to recover the whole sum insured, he would be in a better situation, which the law will not allow. Indeed, from the above quotation from the printed proposals it is evident, that the offices consider themselves liable for partial losses. Nay, some of them, if not all, expressly undertake to allow all reasonable charges, attending the removal of goods, in cases of fire, and to pay the sufferer's loss, whether the goods are destroyed, lost, or damaged by such removal.

Beaves, 4th
edit. p. 294.

Royal Exchange Assurance Company, Sun Fire Office, Phoenix Fire Office, &c.

These policies of insurance are not in their nature assignable, for they are only contracts to make good the loss which the

(a) Since the three first editions of this work were published, it has been held by the Court of King's Bench, upon a writ of error from the Court of Common Pleas, that the printed proposals, containing the above clause, are to be considered as part of the policy: and that the procuring such a certificate is a condition *precedent* to the right of the assured to recover, and cannot be dispensed with, even though the minister and churchwardens wrongfully refuse to grant the certificate.

Worley v. Wood, 6 Term Rep. 702.
2 H. Black. 574. S. C.
See also Roulledge v. Burrell, 1 H. Black. 254.
and Oldman v. Bewick, 2 H. Black. 577. a. (a).

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contracting party himself shall sustain; nor can the interest in them be transferred from one person to another without the consent of the office (a). There is a case in which, by the proposals, these policies are allowed to be transferred, and that is, when any person dies, the policy and interest therein shall continue to the heir, executor, or administrator, respectively, to whom the property insured shall belong; provided, before any new payment be made, such heir, executor, or administrator, do procure his or her right, to be indorsed on the policy at the said office, or the premium be paid in the name of the said heir, executor, or administrator. But in all other cases, there can be no assignment; and the party claiming an indemnity must have an interest in the thing insured at the time of the loss. These points were decided in two causes, one before Lord Chancellor King, and the other before Lord Hardwicke.

Lynch and
another v.
Delsell and
others,
3 Brown's
Parl. Cases,
497.

On the 28th of July 1721, one *Richard Ireland* took out from the Sun Fire Office, a policy of insurance, whereby it was witnessed, that whereas the said *Ireland* had agreed to pay, or cause to be paid to the said office, the sum of five shillings within fifteen days after every quarter-day, for the insurance of his house, being the *Angel Inn* at *Gravesend*, with his goods and merchandize as therein after expressed only, and not elsewhere, viz. the dwelling-house, not exceeding 400*l.* and for the goods in the same only, not exceeding 500*l.*; and for the stable only, not exceeding 100*l.* all then occupied by *James Peck*, from loss and damage by fire; and so long as the said *Richard Ireland* should duly pay or cause to be paid five shillings a quarter, as therein mentioned, the said society did bind themselves, their heirs, executors, administrators and assigns, to pay and satisfy the said *Ireland*, his executors, administrators, and assigns, within fifteen days after every quarter-day, in which he should suffer by fire, his loss not exceeding 1000*l.* according to the exact tenor of their printed proposals. The policy was subscribed the 28th of July 1721, by three of the trustees of the society. Some considerable time afterwards, *Richard Ireland* died, having made his will, and *Anthony* his son sole executor; who brought the policy to the office, and had an indorsement made thereon, that the same then belonged to him: and afterwards,

(a) But in marine insurances, the policy may be transferred. *Delaney v. Soddart*, 3 Term Rep. 26.

namely

namely, at or about *Christmas* 1726, he, the said *Anthony*, paid the office a premium of twenty shillings for one year's insurance, from *Christmas* 1726, to *Christmas* 1727, as by an article in the proposals, he was at liberty to do. On the 24th of *August* 1727, a fire happened at *Gravesend*, which, among others, destroyed the house mentioned in the policy; and some time afterwards the appellants applied to the office, and alleged, that they had purchased the house and goods of *Anthony Ireland*; that the same were their property at the time of the fire, and that they had an assignment of the policy made to them, at the same time that the house and goods were assigned; and they produced an affidavit made by the appellant *Roger Lynch*, in which he swore, that his loss and damage by burning the said house, amounted, at a moderate computation, to 500*l.* and upwards; and upon this affidavit was indorsed a certificate of the minister, churchwardens, and other inhabitants of *Gravesend*, that they verily believed, according to the best of their information, the appellants had sustained a loss of 500*l.* and upwards. But neither in the affidavit or certificate, was any mention made of any loss being sustained by the appellants by the burning of any goods in the said house; nor was any affidavit made by *Anthony Ireland*, in whom the property of the policy was, that he had suffered any loss. The appellants, however, insisted that the office should pay them 1000*l.* for their loss sustained by the burning of the house and goods; and they accordingly filed a bill in Chancery, setting forth, that *Anthony Ireland* agreed to sell and assign to the appellants the house, stables, and goods, and also, at the same time agreed to assign the policy; and that by indenture of the 24th of *June* 1727, for 250*l.* *Ireland* did assign to the appellants a lease he had of the house and stables for the residue of a term of 70 years, which commenced at *Midsummer*, 16 *Car. 2.*; but the goods, for which the appellants, as they alleged, were to pay 500*l.* being intended for one *Thomas Church*, who was to hold the inn under the appellants, *Ireland*, by deed poll of the same date, sold the same to *Church* for his own use. The bill also stated, that by another writing of equal date, *Ireland* assigned the policy, and all money and benefit thereof, to the appellants. That although the bill of sale of the household goods was made to *Church*, yet, as the appellants paid the purchase-money for the same, *Church* assigned his bill of sale to them, for securing the money

C H A P. money they had paid for the goods; and afterwards, by another
 XXIII. writing, released to the appellants his benefit and interest in the
 policy. The bill prayed satisfaction.

The respondents put in their answer, in which they set forth the nature and method of the insurances made by the office, and admitted the policy in question, and the appellants' application for 1000*l.* loss: but said, that the affidavit produced was not agreeable to the proposals; and that they had been informed and believed, that no assignment of the policy was made to the appellants, nor any assignment of goods made to them by *Church*, till after the fire. They insisted, that the policies, issued by the office, were not, in their nature, assignable, the same being only contracts to make good the loss which the contracting party himself should sustain: and the policy in question was first made to *Richard Ireland*, to pay his loss, and was afterwards declared by indorsement to belong to *An.hony Ireland*; and that no other person was entitled to the benefit of it. The cause proceeded to issue, and witnesses were examined on both sides; and upon the appellants' own evidence it appeared, that the first discourse between the appellants and Mr. *Ireland* about the policy was after the execution of the assignment of the house, and that the agreement (if there was any) about the policy was not at the time when the appellants agreed to purchase *Ireland's* term in the house. It appeared further, that the assignment of the policy, though bearing date *before*, was not made and executed till some time *after* the fire; so that the agreement for assigning the policy was a voluntary concession of *Ireland* without any consideration, and independent of the bargain for the house, and never made till after *Ireland's* interest in the policy, as to the house, was determined, by his selling his interest in the thing insured, and not carried into execution till the thing was lost. As to the appellants' property in the goods, they proved an assignment from *Church* to them, as a security for 300*l.* but omitted, in their interrogatories, the material question, *when this assignment was made*: though the respondents, by their answer, put the time plainly in issue, by insisting, that it was after the fire; and it did not appear that the appellants ever had any property in the goods. The respondents on their part proved, that the office did not insure any persons longer than they continued their property

perty in the thing insured ; and that persons dealing with them might not be mistaken, such notice was usually given.

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Lord Chancellor *King*.—"These policies are not insurances of the specific things mentioned to be insured ; nor do such insurances attach on the realty, or in any manner go with the same as incident thereto, by any conveyance or assignment : but they are only special agreements with the persons insuring, against such loss or damage as they may sustain. The party insuring must have a property at the time of the loss, or he can sustain no loss ; and consequently can be entitled to no satisfaction. There was no contract ever made between the office and the appellants for any insurance on the premises in question. Not only the express words, but the end and design of the contract with *Ireland* do, in case of any loss, limit and restrain the satisfaction to such loss as should be sustained by *Richard Ireland* only ; and the indorsement on the policy declared that right to his executor *Anthony Ireland* only. These policies are not in their nature assignable ; nor is the interest in them ever intended to be transferable from one to another, without the express consent of the office. The transactions in the present case, by changing their property backwards and forwards, and rendering it uncertain whose the true property is, raise a suspicion, and fully justify the caution of the office, in preventing the assignment without consent of the managers, which method is pursued by all the insurance offices. Besides, the appellants' claim is at best founded only on an assignment never agreed for till the person insured had determined his interest in the policy, by parting with his whole property, and never executed till the loss had actually happened." His lordship therefore dismissed the bill.

Upon this decree there was an appeal to the House of Lords ; and after hearing counsel on both sides, it was ORDERED AND ADJUDGED, that the same should be dismissed, and the decree therein complained of affirmed.

A few years afterwards this case was cited with approbation by Lord *Hardwick*, and relied upon by him as the ground of his opinion.

Anne

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The Sadlers'
Company v.
Bodcock
and others
2 Aik. 554.

Anne Strode, having six years and a half to come in a lease of a house from the plaintiffs, on the 27th of *April* 1734, became a proprietor of the Hand-in-hand Office, by insuring the sum of 400*l.* on the house, for seven years; and on paying twelve shillings down, and three pounds some time after, the Company agreed, "to raise and pay, out of the effects of the contribution stock; the said sum of 400*l.* to her, and her executors, administrators, and assigns, so often as the house shall be burnt down within the said term, unless the directors should build the said house, and put it in as good plight as before the fire; and on the back of the policy it was indorsed, that if this policy should be assigned, the assignment must be entered within twenty-one days after the making thereof." Mrs. *Strode's* lease expired at *Midsummer* 1740, the house was not burnt down till the *January* after 1740, and she made an assignment of the policy to the plaintiffs the 23d of *February* after 1740. The question is, Whether the plaintiffs, the assignees of Mrs. *Strode*, are entitled to the 400*l.* or to have the house built again; or whether the house being burnt down after Mrs. *Strode's* property ceased in it, the Company are obliged to make good the loss to her assignee of the policy? The Company made an order, subsequent in time to Mrs. *Strode's* policy in 1738. "That, whereas policies expire upon the property of the insured's ceasing, if there is no application of the insured to assign, or to have the loss made up, then the person having the property may insure the said house in the said office, notwithstanding the term for which the house was originally insured is expired." There was evidence read for the plaintiffs to shew that they tendered the assignment to the defendants, to enter in their books, but they refused to accept of it.

Lord Chancellor *Hardwicke*.—"During the progress of this cause, while the defendants seemed to depend chiefly upon the subsequent order, I was of opinion against them. But, upon hearing what was further offered, I think the plaintiffs are not entitled to be relieved. There may be three questions made in this cause. First, Whether this accident, which has happened, is such a loss, as obliges the defendants to make satisfaction to the plaintiffs? Secondly, Whether upon the terms of the original policy, the office is obliged to do it? Thirdly, which

is rather consequential of the former, Whether the plaintiffs are properly assignees of Mrs. *Strode* under this policy? If this matter rested singly upon the policy itself, I should not think it such a loss, as would oblige the defendants to make satisfaction. Under this policy, the state of the case is, Mrs. *Strode* was only a lessee, her time expired at *Midsummer* 1740, the house was burnt down in *January* after, *within the seven years*; the plaintiffs, the *Sadlers' Company*, were ground landlords, and entitled to the reversion of the term: upon the 23d of *February*, seven months after the expiration of the term, and one month after the fire, the assignment was made, and in consideration of five shillings only; so that it must be taken as a voluntary assignment, as it stands before me. It has been insisted, on the part of the defendants, that the plaintiffs are not entitled to recover, as standing in the place of Mrs. *Strode*, because she had no loss or damage, her interest ceasing before the fire happened. And this introduces the second and third questions. I am of opinion, it is necessary the party insured should have an interest or property at the time of insuring, and at the time the fire happens. It has been said for the plaintiffs, that it is in nature of a wager laid by the insurance company, and that it does not signify to whom they pay, if lost. Now these insurances from fire have been introduced in later times, and therefore differ from insurance of ships, because there *interest or no interest* is almost constantly inserted, and if not inserted (a) you cannot recover, unless you prove a property. By the first clause in the deed of contribution in 1696, the year this society, called the *Hand-in-Hand Office*, incorporated themselves, the society are to make satisfaction in case of any loss by fire. To whom, or for what loss, are they to make satisfaction? Why, to the person insured, and for the loss he may have sustained; for it cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage. By the terms of the policy, the defendants might begin to build and repair within six days after the fire happens. It has been truly said, this gives the society an option to pay or rebuild, and shews most manifestly they meant to insure upon the property of the insured, because nobody else can give them leave to lay

(a) This case was decided in the year 1743, previous to the passing of the statute of 29 Geo. 2. ch. 37.

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even a brick; for another person might fancy a house of a different kind. Thus it stands upon the original agreement. The next question will be, whether the subsequent order, made by the defendants in 1738, has made any alteration. I am of opinion it has not, for it was made only to explain a particular case in the policy: for it might have been a question, whether Mrs. *Strade* could have come, before the expiration of the term, to examine the books of the office, and therefore this order was made to give her such a power. It has been strongly objected that the society could not make such an order. I am very tender of saying, whether they can or not. Because, on one hand, it might be hard to say, that as a society they cannot make any order for the good of the society: on the other hand, it would be a dangerous thing to give them a power to make an alteration, that may materially vary the interest of the insured. The assignment is not at all within the terms of this order, because it is plain, it meant an assignment before the loss happened. Now with regard to the loss happening before the assignment made, Mrs. *Strade* was entitled to nothing but what was to be paid back upon the deposit. It is plain she thought so, for if she had imagined she had been entitled to 400*l.* would any friend have advised her to make a present of it to the plaintiff? The case of *Lynch v. Dalzell*, in the House of Lords, shews how strict this court and that House are, in the construction of policies, to avoid frauds." The bill here must be dismissed.

Vide supra.

In the body of the policy, the company acknowledge the receipt of the premium at the time of making the insurance: and by the printed proposals of the different societies, it is expressly stipulated, that no insurance shall take place, till the premium be actually paid by the insured, his, her, or their agent or agents. This premium or consideration money is in all the offices at the rate of two shillings *per cent.* for any sum not exceeding 1000*l.* and two shillings and sixpence from 1000*l.* upwards. But this must be understood to mean the premium upon *common insurances* only: for upon hazardous trades, and wooden buildings, &c. the premium is proportioned to the risk. Besides this, by a late act of parliament, a duty of one shilling and sixpence *per annum* is laid upon every hundred pounds of property insured from fire. By a more modern statute, an additional duty of sixpence, for every sum of one hundred pounds insured, is imposed, making

22 Geo. 3.
c. 48. s. 1.
d. 2.

37 Geo. 3.
c. 90. s. 19.

in

in the whole two shillings *per cent.* The duty imposed by the first act is not to extend to publick hospitals.

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We have formerly seen, that whenever the risk to be run was entire, there never was a return of premium, though the contract should cease and determine the next day after its commencement. This rule applies to insurances against fire, which generally are made for one entire and connected portion of time, which cannot be severed: and therefore if the property insured should be destroyed by fire, arising from the act of a foreign enemy, the very day after the commencement of the policy though the underwriter would be discharged, yet there can be no apportionment or return of premium.

Antz. c. 4.

By a statute passed in the reign of his present Majesty, the stamp duties on policies for insuring houses, furniture, goods, wares and merchandizes, or other property from loss by fire, are repealed; and instead thereof it is provided, that for every policy of assurance from loss by fire, where the sum insured shall not amount to 1000*l.* the sum of three shillings; and where the sum insured shall amount to 1000*l.* or upwards, the sum of six shillings shall be paid.

37 Geo. 5.
c. 90. § 23.

Stat. 24.

As the purest equity and good faith are essentially requisite, as has been already shewn, to render the contract effectual when it relates to marine insurances; so it need hardly be observed, that it is no less essential to the validity of the policy against fire: because in the latter, as well as in the former, the insurer, from the nature of the thing, is obliged, in a great measure, to rely upon the integrity and honesty of the insured, as to the representation of the value and quantity of the property, which is the object of the insurance.

Vide ante.
c. 9.

A D D E N D A.

The following Case may properly be introduced after the Cases on Insurances on Freight, p. 46. *et seq.*

Forbes and
another v.
Cowie,
Sittings af-
ter Mich.
T. 1808.

INSURANCE on the ship *Chiswick* " at and from any port or " ports in *Hayti* to *Liverpool*, or the vessel's port or ports of " discharge in the United Kingdom, with leave to chase, &c." The insurance was declared to be " on freight valued at " and the loss was stated to be by perils of the sea. The following facts were admitted: That the plaintiffs being owners of the *Chiswick* in the declaration mentioned, procured a licence for her to sail from *Liverpool* to *St. Domingo* to trade there and to bring home a return cargo of the produce of that country.

That the *Chiswick* sailed from *Liverpool* to *St. Domingo*, called *Hayti*, and arrived at *St. Domingo* on the 4th of *July* 1808, with a cargo of goods belonging to the plaintiffs, to be there bartered for other goods to be brought back to *Liverpool* in the said ship.

That part of the goods carried from *Liverpool* were bartered and exchanged for 55 bales of cotton of the produce of *St. Domingo*, which were put on board the ship for her voyage home.

The remaining part of her outward cargo being still on board would, in all probability, in a few days have been exchanged for other goods to be put on board in like manner, but for the loss hereinafter-mentioned.

The ship with such remaining part of her outward cargo, and the said 55 bales of cotton on board being in good safety at *St. Domingo* on the 15th day of *July* 1808, was by the perils of the seas lost. The defendant has settled with the plaintiffs for the loss of the freight of the said 55 bales of cotton, without prejudice to the plaintiffs' claim for a further loss on freight if they are entitled to it.

The

The remaining part of the outward cargo, though damaged, was saved, and in 12 days after the loss of the ship was exchanged for 250 tons of coffee and 100 tons of wood, the produce of *St. Domingo*, the freight of which would have been of a larger value than the sum insured on freight if the ship had not been lost.

The plaintiffs were interested in the said freight in the declaration mentioned.

This action is brought to recover a total loss on the freight home.

This case was at the bar compared to the case of *Horncastle v. Stuart*, (*ante*, p. 48.) but

Lord *Ellenborough* was clearly of opinion that as there was no charterparty, nor the policy valued, this case was exactly like that of *Tonge v. Watts*, (*ante*, p. 46.) and the plaintiffs were nonsuited.

In the following term a motion was made to set aside this nonsuit, but even a rule to shew cause was refused by the whole Court.

The two following Cases may properly be adverted to after the Case of *Noble v. Kennoway*, *ante*, p. 58.

THIS was an action on a policy of insurance on fish, to commence from the loading thereof on board the ship *Dutebess of Gordon*, at and from *Newfoundland* to a port in *Portugal*, warranted to depart with a *Portugal* convoy. In one count the loss was averred to be by capture, in another by perils of the sea. The ship proceeded from *Lisbon* to *Newfoundland*, where she arrived in *July*, and then proceeded on an intermediate voyage to *Sidney* in *Nova Scotia*, in *August*, and returned with a cargo of coals on the 30th *September*. That about the 1st *October* the *Cassor* frigate sailed with a convoy from *Newfoundland* for *Portugal*; but there was not a cargo of fish ready, or in a fit state for the ship to sail by the first convoy. That

Ougler v. Jennings,
Sitt. in C.
P. after
Eas. 1800.

the ship sailed perfectly seaworthy on the 21st November for *Oporto*; was captured, recaptured, and afterwards totally wrecked. It was proved that the vessel was not by means of the intermediate voyage in any respect rendered less capable of performing her voyage to *Portugal*; and that she had not taken in any of her homeward cargo of fish before her return from the intermediate voyage. Several witnesses conversant with the *Newfoundland* trade swore to the constant usage of ships taking these intermediate trips while their cargoes are getting ready, and that these voyages are absolutely necessary to be taken for the support of the colony; that there is a great supply of coals from *Sidney*, and of bread and flour from *Quebec*, to which latter place several ships went that season.

Lord *Eldon*, then Chief Justice of the Court of Common Pleas, told the jury, that he thought the practice of the trade in this case was as fitly to be received in evidence as in other cases in which such proof had been admitted. Then his Lord-
 Dougl. 520. ship quoted the case of *Noble v. Kennoway*, (*ante*, p. 58.) and said, no doubt the policy here is meant to protect the first cargo which shall be laden after the ship's arrival; but the underwriter must refer himself to the usage of the trade; he is bound to know it. Is there such a usage here? If, indeed, the evidence were to lead to this, that the ship may make intermediate voyages for several years, that would be too dangerous to give effect to such a usage. But if a trader *bonâ fide* sends the ships in their turn on an intermediate voyage, that seems reasonable: *studiously sending them out of turn* would be a deviation. The next question then is, whether this ship has been employed otherwise than as the usage warrants. If you think the usage does exist; if you think it reasonable; and if you think this ship acted *bonâ fide* in taking the intermediate voyage, you will find for the plaintiff, which they did accordingly.

Wallence
 v. Dewar,
 Sitt. a fier
 Mich. 1808

So in a subsequent case on an insurance, dated 26th August 1807, on ship *Courier*, freight and cargo, at and from any port or ports in *Newfoundland* to one port of discharge in *Portugal*, or to any port or ports in the United Kingdom. The facts admitted were, that the goods were loaded at *Cape Broyle* in *Newfoundland*, between the 13th October and the 14th December 1807; that she received sailing instructions from the convoy,

and sailed for *Dartmouth*, and was afterwards totally lost in a gale of wind. That a policy of insurance on the ship *Courier* had been underwritten on the 29th *June* 1807; and that at the time the defendant underwrote the policy in question, he was not informed by the broker, or by any other person that the *Courier* was intended to be employed in banking on the coast of *Newfoundland*, subsequent to the date of the policy in question; or that the said policy of the 29th *June* 1807, had been previously effected on the said ship to cover her banking voyage to the 31st *October* 1807; and that the said ship *Courier* was employed banking, from whence she returned to *Cape Broyle* on 13th *October* 1807. The plaintiff, in order to prove that it was not necessary to communicate this banking voyage, called several witnesses to prove the general usage that *Newfoundland* ships almost always engaged either in banking or in intermediate voyages till the fish was ready.

Lord *Ellenborough* said,—“The assured are certainly bound to communicate what the underwriters do not know; and what the assured do, but what is common between them both, need not. The question then is, whether the banking voyage is usually interposed, because if so, the fact need not be divulged, If these separate voyages and insurances are notorious in the trade, then the common words “at and from” must mean “at the place when preparing for the voyage home, and then from.” If there are exceptions to this general usage, the underwriter ought to have asked, whether in this case the exception existed.” Verdict for the plaintiff.

The two following Cases will tend to illustrate the doctrine contained in the case of *Airey v. Bland*. Ante, p. 34.

THE first of them was an action of assumpsit for money had and received. The principal item in dispute between the parties was a sum paid by the plaintiff to the defendant under the following circumstances:

Edga v.
Bumstead,
1 Campb: 411.

The plaintiff being an insurance broker, got a policy underwritten for the defendant, a merchant, on the ship *Alfred*, which was subscribed (among others) by one *Lomas*. A loss happened; whereupon the plaintiff paid the full amount of the sum insured to the defendant. Previously to this, *Lomas* had become insolvent, without the plaintiff being aware of the fact; and it was now contended, that he had a right to recover the sum he had paid to the defendant in respect of *Lomas's* subscription, as money paid under a mistake of the fact. But Lord *Ellenborough* held, that on account of the well-known course of dealing between the insurance broker, the merchant and the underwriter, the money could not, under these circumstances, be recovered back from the assured.

*Du'zell v.
Muir
& Campbell*
532.

It has also lately been decided, that in an action by the assured against an underwriter to recover the premium, the policy subscribed by the defendant is conclusive evidence that he has received the premium. This was held in an action for money had and received, tried at *Guildhall*. The defendant had underwritten a policy of insurance effected by one *Reid*, an insurance broker, on account of the plaintiff, upon goods by ship or ships, at and from *Berbice* to *Great Britain*. This action was brought to recover back the premium, on the ground that the goods had never been shipped.

The plaintiff gave in evidence the policy signed by the defendant, which contained the usual acknowledgment on the part of the underwriters, "*confessing ourselves paid the consideration due unto us for this assurance by the assured*," &c. It appeared, however, that no money had really been paid in respect of the insurance in question. The plaintiff being the holder of a bill of exchange accepted by *Reid*, which was not paid when due, the latter proposed by way of satisfaction to get policies of insurance underwritten for him. This policy was effected in consequence; and *Reid* having a running account with the defendant, had not paid him any part of the premium at the commencement of this action.

It was contended, that under these circumstances the action would not lie, as no money had been received by the defendant either

either from the plaintiff or *Reid*, or paid by the plaintiff either to *Reid* or the defendant.

Lord Ellenborough.—The defendant is bound by the receipt in the policy. If a man acknowledges that he has received a sum of money from the broker, and accredits him with his principal to that amount, he shall not afterwards, as between himself and the principal, be allowed to say that the broker never paid him. I should completely knock up the insurance business, if I were to allow this acknowledgment to be impeached. It is well known that there are running accounts kept between the insurance broker and the underwriter; and *Lord Kenyon* held that the former, before paying premiums to the latter, might maintain an action against the assured to recover the amount of them as for money paid.

Mr. Campbell adds in a note upon the last case, that he had not been able to find any decision of *Lord Kenyon's* upon this point: but that learned Reporter refers to the case of *Airey v. Bland*, and then adds a very acute and sensible observation, "that the object of the formal acknowledgment of the receipt of the premium inserted in the policy is probably to preclude the necessity of proving it when a loss happens, and to prevent the underwriters from objecting, that there was a want of consideration for their promise, in case the broker has not paid them. The receipt is no bar to an action for the premium by the underwriter against the broker; and the distinction seems to be this, that as between these parties it is no evidence at all, but that as between the underwriters and the assured it is conclusive. It follows as a consequence from this decision, that an action cannot be maintained for premiums of insurance by the underwriters against the assured, which has hitherto been *perpetua questio*." p. 534.

The three following Cases are of importance to shew that an *American* subject shall not claim from an *English* underwriter any indemnity from the act of detention or embargo by his own government: and therefore so far extend, but do

not, as I conceive, alter the principle contended for in Chapter the Fourth, upon the doctrine of Abandonment. For although the words of the policy are general, "all restraints" and detainments of all kings, princes, and people, &c." yet they must ever be considered with reference to the benefit of the state in which the contracting party lives, and to the policy which it may think proper to adopt. I have not thought it necessary to state the facts of each case; because one judgment was pronounced upon the whole, and the Lord Chief Justice (Lord *Ellenborough*) in pronouncing that judgment stated all the material facts upon which the judgment of the court was founded.

Lord *Ellenborough*, C. J.

Conway v.
G. & S.
Conway v.
Forbes.
Maury v.
Shedden.
Hil. Term
49 Geo. III.

These were cases in each of which the plaintiffs claimed a right to abandon in consequence of the *American* embargo in December 1807, and the main question in each was the same. The first was upon a policy on goods on board the *Swift*, at and from *New York* to *Liverpool*, and the interest was averred in one count to be in the plaintiffs jointly; in another, in one of them only, i. e. *Thomas Davidson*; and in a third, in one *John Townsend*. *Townsend* was a resident citizen of *America*, and had consigned the goods to the plaintiffs for sale, on his (*Townsend's*) account and risk. The plaintiffs, *Conway* and *Davidsen*, are *British* subjects, carrying on business as merchants in partnership at *Liverpool*; *Conway* residing at *Liverpool*, and *Davidsen* having for some time past resided in *America*. The invoice and bill of lading are dated the 29th of *December* 1807. Before the shipment *Davidsen* had agreed to grant *Townsend* an anticipation of 6000*l.* on account of these and certain other goods, by bills on the plaintiffs: and accordingly, on the 7th of *November* 1807, bills to that amount were drawn by *Townsend* on the plaintiffs, and these bills were accepted by *Davidsen*, the partner of *Conway*, in *America*, within a day or two after their date, and were paid when due by the plaintiffs. The plaintiffs have been reimbursed part of the amount of these bills; but 212*l.* 18*s.* 3*d.* is still due to them upon that transaction. This policy was subscribed on the 25th of *January* 1808; and the plaintiffs charged the premiums to *Townsend's* account. On the 22d of *December* 1807, an act was passed by the *American* government for laying

an embargo on all ships and vessels in their ports. By this embargo this vessel was detained; and as soon as they heard of the detention, the plaintiffs abandoned. It is stated indeed, in the case of *Conway v. Gray*, that the plaintiffs abandoned the vessel and nothing is said as to the goods; and as the insurance was on the goods, an abandonment of the vessel could give no claim; but we presume that this is a mistake, and that the goods were abandoned.

In the second cause (*Conway* and another v. *Forbes*) the facts are nearly similar. The policy was upon goods in the same ship; those goods were shipped by *Alexander Macomb*, a resident *American* citizen: they were consigned to the plaintiffs, on *Macomb's* account and risk. *Davidson* agreed to grant *Macomb* an anticipation of 7500*l.* by bills on the plaintiffs, accepted by *Davidson* in *America*; and the plaintiffs have paid 2500*l.* upon those bills. The bill of lading and invoice are dated at *New York*, the 24th *December* 1807, and the policy is dated the 25th *January* 1808. The plaintiffs charged the premium to *Macomb*.

In *Maury v. Shedden* the policy was upon ship valued at 6000*l.* and *James Maury* Esquire, the *American* consul, who was then resident at *Liverpool*, was the sole owner. Mr. *Maury* is a native of *America*, but came to reside at *Liverpool* as a merchant in 1786; and from the year 1790 has been the *American* consul there. The ship is an *American* vessel, and registered there under a privilege allowed by the navigation laws of *America* to their consuls.

Upon each of these cases this question arises; 1st. Whether the *American* embargo will warrant an abandonment by or on behalf of an *American* subject: and if not; then a second question arises in the first and second causes; whether *Conway* and *Davidson*, as consignees of the goods, being in advance to the consignors and under acceptances for them, (in one case the plaintiffs being in advance and also under acceptances; in the other case against *Forbes*, the plaintiffs were only under acceptance,) have a right to apply the policies to their own interests, as such, and to abandon on that account. As to the first; in all questions arising between the subjects of different states,

each

each is a party to the public authoritative acts of his own government; and on that account, a foreign subject is as much incapacitated from making the consequences of an act of his own state the foundation of a claim to indemnity upon a *British* subject in a *British* court of justice, as he would be if such act had been done immediately and individually by such foreign subject himself. This seems to be established by *Tatung v. Hubbard*, 3 Bos. and Pull. 291. That was an action by the owners of a *Swedish* vessel against a *British* subject for not supplying the vessel with a cargo at *Saint Michael's*. The sailing of the ship from this kingdom had been prevented a considerable time, and until it was too late for the fruit season at *Saint Michael's*, by an embargo here upon *Swedish* vessels. That embargo was in the nature of reprisals for what were considered acts of aggression by the *Swedish* government. The court was of opinion, that if that had not been the case of a *Swede* against a *British* subject, the plaintiff would have been entitled to recover: but as the embargo was produced by acts of the *Swedish* government, and every *Swede* was to be considered a party to those acts, it was in effect the plaintiff's own fault that his vessel was detained; and then loss which resulted from it was one he ought himself to bear. He was bound to proceed with all convenient speed: the acts of his government led to his being prevented; he was considered as a party to those acts, and was, therefore, looked upon as having failed in his part of the contract, viz. proceeding with all convenient speed. In the cases now before the court, the foundation of the abandonment is an act of the *American* government. Every *American* subject is to be considered as a party to that act: and has, virtually, the concurrence and consent of all, and amongst the rest, the concurrence and consent of the assureds in these cases: the assureds, therefore, have joined in a resolution, that the ships in question shall not be allowed to sail, but shall remain in their ports: and is it possible for them afterwards to make their not sailing the foundation of an action? The party who himself prevents the act from being done has no right to call upon the underwriters to indemnify him against the loss he may sustain from such act not being done. Where the insured and the insurer are both subjects of the same state, the question will stand upon very different grounds of consideration.

As to the second question, whether the consignees have not a right to apply the policies to their own interests, and to abandon on that account; we are of opinion that they have not. It might perhaps be difficult to make out that they had such an interest as was capable of abandonment, because they were to have no control over the goods but upon their arrival in *England*; and it may also be very questionable whether any policy, which is effected clearly to cover the interest of the consignor, can be applied to protect the interest of the consignee. But the particular ground of our decision is this, that where a policy is effected on behalf of the consignor, and the conduct of the consignor, or of the state to which he belongs, has taken away from him the right of enforcing it directly and effectually for his own benefit; the consignee is not at liberty to apply it to his interest, and enforce payment as though it had been made on his account. We do not say a consignee may not insure, we only say that he is so far identified in interest and right with his consignor, as not to be able to apply with effect to his own interest; which is derived out of that of the consignor, an insurance which was effected in order to cover the interest of the consignor, but which, upon the principle already stated, cannot be available for that purpose. The underwriter has an implied pledge from the assured, that he will do no act to obstruct the voyage, and when that pledge is broken by the person on whose account the insurance was made, can another person, who has paid no premium out of his own pocket, step in to take the benefit of that insurance, merely because his dealings with the assured would have enabled him to have insured in his own name? There is no case which decides that he can, and it would be gross injustice that he should. *Wolffe v. Horn-castle*, 1 Bos. & Pull. 316. which was cited in the argument, goes no such length. In that case the plaintiffs had effected a policy to cover the interest of one *Lund* in a cargo, and had advanced 300*l.* on the credit of that cargo. The main question was, whether the policy were so effected as to cover *Lund's* interest, and if it were not, then it was contended that it might be applied to cover that interest which the plaintiffs had acquired by their advance of the 300*l.* The Court were unanimous that the policy was so effected as to cover *Lund's* interest; so that a decision upon the other point was unnecessary: but they intimated a clear opinion upon that point, that the plain-

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tiffs had an insurable interest ; and they seem to have thought the policy might have been applied to it, if it could not have been applied to *Lund's*. How does that case however bear upon this ? *Lund* had done no act to forfeit his right upon the policy, and if he could not have recovered, would have been merely because the policy was not effected so as to be capable of covering his interest : the only objection made to *Lund's* interest being that *Wolffe* had made the insurance without orders or authority from *Lund* ; and then if it could not apply to the 300*l.* the plaintiffs had advanced, it would have been applicable to nothing. Here the policies were effected so as to be capable of covering the consignors's interest, and for the express purpose of doing so : they are applicable to that, and the consignors have forfeited their rights by the act of their government. The case of *Wolffe v. Horncastle*, therefore, concludes nothing in favour of these plaintiffs. In truth in that case had the plaintiffs been allowed to recover upon their own interest, on account of the advance they had made, it would in substance have been suffering *Lund* to recover *pro tanto* ; because then they could not have resorted to him for reimbursement : and in these cases, if *Conway* and *Davidson* were allowed to recover in respect of their advances, it would in substance be suffering the *American* consignors to recover *pro tanto*, because it would wipe off the claim which *Conway* and *Davidson* have upon them. In *Wolffe v. Horncastle* it would have been in furtherance of justice, because *Lund* had done nothing to forfeit his claim upon the policy : in this case it would be against justice, because these *American* consignors have done that by which their claim is precluded. For these reasons we are of opinion, that in each of these cases the *possea* must be delivered to the defendant."

Baring v.
Day, 3 East,
57. antio, p.
183.

In consequence of what fell from the Court in the case of *Baring v. Day*, in an act soon after passed "For preventing the various Frauds and Depredations committed on Merchants, Ship Owners and Underwriters, by Boatmen and others, within the Jurisdiction of the Cinque Ports ; and also for remedying certain Defects relative to the Adjustment of Salvage under a Statute made in the 12th of Queen Anne ;" there are two clauses introduced affecting the whole kingdom, (except the Cinque Ports, which are regulated by the prior provisions of the act,) and

and which are evidently aimed at the deficiencies discovered by the Court in the former statute. "And whereas it is expedient that the like means of conclusively adjusting and recovering the *quantum* of the monies or gratuities to be paid to the several persons acting or employed in the salvage of any ship, vessel, or goods, should subsist and be by law applicable in cases where the salvors shall have acted under and by the mere employment and authority of the commander or other superior officer, mariners or owners of any ship or vessel in distress, as now by law provided for adjusting the *quantum* of such monies or gratuities which shall have become due in cases where application shall have been first made to officers of the customs, or other officer or officers in that behalf made and appointed in and by a certain statute made in the twelfth year of the reign of our late sovereign Queen Anne, intituled, &c. be it therefore enacted and declared, by the authority aforesaid, that from and after the passing of this act, all and every means which in virtue of the statute last-mentioned subsist, and may now be by law applied for the conclusively adjusting, and for the recovering of the *quantum* of the monies or gratuities to be paid to the several persons acting or being employed in the salvage of any ship, vessel, or goods, in cases where application shall have been first made pursuant to that statute to officers of the customs, or other the officer or officers therein in that behalf mentioned, and assistance shall have been thereupon rendered and had in pursuance of the provisions of that statute, shall be by law applicable and available in like manner to all intents and purposes, and in cases where the salvors shall have acted under by the mere employment and authority of the commander or other superior officers, mariners, or owners of any ship or vessel in distress, although no such application shall have been made to, nor any authority or assistance derived from any officers of the customs, or other the officer or officers in the said statute in that behalf mentioned; and that upon payment or tender and refusal of the *quantum* of monies or gratuities to be paid to the several persons, who shall have acted or been employed in such salvage, or in case such payment or tender cannot be made, or security being given for the due payment thereof to the satisfaction of the justices, who shall have adjusted such *quantum* of gratuities, it shall not be lawful for any officer of the customs, or other person or persons having the possession or custody of such ship, vessel,

48 Geo. 3.
ch. 130.
s. 21.

vessel, or goods, any longer to retain the possession or custody of the same, or any part thereof by reason or pretence of any claim or right to a compensation or gratuity for such salvage as aforesaid, or for having acted or been employed therein.

SECT. 22. Provided always, that in cases where the salvors shall have acted without application made to, or without any authority derived from any officer of the customs, or other officer in the said act mentioned, and the commander or other superior officer, mariners, or owners of such ship or vessel so saved as aforesaid, or the merchant or other person whose goods shall be so saved, or their agents as aforesaid shall disagree with such salvors touching the *quantum* of the monies or gratuity deserved by any person so employed as aforesaid, it shall be lawful for the commander of such ship or vessel so saved, or the owner of the goods, or merchant interested therein, or their agents, and for such salvors as aforesaid, to nominate three of the neighbouring justices of the peace to adjust the *quantum* of the monies or gratuities to be paid to such salvors, and in case the parties shall not agree in such nomination, that then, on the application of any of the parties to any one neighbouring justice of the peace, the justice so applied to shall nominate two other neighbouring justices of the peace; and such three neighbouring justices shall and may thereupon, and they are hereby authorized and required to adjust the *quantum* of the monies and gratuities to be paid to all and each of such salvors who shall disagree with such master, commanding officer, merchant, or owners, or their agents as aforesaid, touching the *quantum* of monies or the gratuity to be paid to him or them respectively, for his or their having been employed and acted in such salvage as aforesaid.

The following Case seems too important on the Subject of *Representation*, at the Time of signing the Ship, to be omitted in this Place.

It was an action on a policy of insurance on goods in the *Fanny*, from London to Hayti.

Edwards,
v. Footner,
& Campbell,
550.

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The ship was captured by a *French* privateer with the goods on board, and the question was, whether the underwriters were discharged by a representation concerning her equipment.

It appeared, that about a week before the policy was signed the names of the underwriters were put down upon a slip when the broker stated to the defendant, "That the *Fanny* was to sail with the *Hopewell* and *Young Roscius*, both armed ships, and that she was herself to carry *ten guns and twenty-five men*." There was no evidence of any conversation upon the subject having passed between the parties either when the policy was signed or in the intervening period. In fact, the *Fanny* sailed by herself, and carried only *eight guns and seventeen men*. It was contended, that the ship was sufficiently equipt to be seaworthy, and that what was said, when the defendant's name was put upon the slip, could not be considered as a representation which the assured were bound to comply with, as the slip was no evidence of the contract, and the Court could only look to what took place when the policy was subscribed. This very point Anno 473: had been lately decided in *Dawson v. Atty*, 7 East, 367. where it was held, that although the broker, when the slip was subscribed, had said that the ship was an *American*, yet, as he had not represented her to be of any particular country at the time when the policy was subscribed, she did not require to be documented as an *American*, and, although she was captured for want of a certificate required by a treaty between the government of the captors and the United States of *America*, the owner of the goods recovered against the underwriters.

Lord *Ellenborough*.—"If a representation is once made, it is to be considered as binding, unless there is evidence of its being afterwards altered or withdrawn. In the case cited the vessel was stated to be an *American* when the slip was made out; but when the policy came to be signed, the broker said generally, "That it was an insurance on goods in the *Hermon*," without describing her as of any particular country. There the first conversation was qualified and controuled by what followed. But here there is no evidence of any conversation upon this subject between the parties subsequently to the statement that the ship was to carry 10 guns and 25 men; and this having

taken place when the insurance was talked of, and the terms of it agreed upon, it must be referred to the policy, and treated as a representation, which required to be substantially complied with on the part of the assured."

It had for some time been a question at the bar, where the port, to which the vessel was insured, had fallen into the enemy's hands before the arrival of the ship, whether the ship still continued under the protection of the policy to a place of safety. The better opinion at the bar was, that the vessel was not protected, for that the underwriter might justly say, I contracted to insure your ship to *A.* but not to *B.* This point came directly before the Court in the following case :

Parkin v.
Tunno,
Essex T.
49 G. 3

The insurance was on goods on board the ship *Laurel*, at and from *Bristol* to *Monte Video*, and any other port or ports in the *River Plate*, in possession of the *English*; and the plaintiff declared on a loss by perils of the sea. It appeared at the trial at *Guildhall*, before Lord *Ellenborough*, that when the vessel appeared in the *River Plate*, *Monte Video*, and every other port in that river, except *Maldonado*, was in the possession of the enemy, (there being then war between *Great Britain* and *Spain*), and the *English* commander of *Maldonado* ordered the vessel away immediately upon her arrival, in consequence of the urgency of public affairs whereupon the vessel, being short of water and in want of repairs, bore away directly for *Rio Janeiro* in the *Brazils*, being the nearest friendly port of safety, and in her course thither she met with a peril of the sea, to which the injury sustained by the goods might fairly be attributed in the absence of any direct evidence of a prior cause of damage. It was therefore insisted upon at the trial, and now again in moving to set aside the nonsuit, that the ship not being able, under these circumstances, to proceed to any port in the *River Plate*, in the possession of an enemy, and being ordered away from *Maldonado*, immediately after her arrival there, by the authority of the *British* commander, whom the master was bound to obey, the policy continued to cover her to the nearest port of safety, to which she was under the necessity of repairing. But

Lord *Ellenborough*, at the trial, and now again with the concurrence of the Court, was of opinion, that the policy contain-

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ing a contract for a specific voyage could not be extended by implication to cover the ship in her voyage to *Rio Janeiro*, notwithstanding the circumstance which had occurred to induce the necessity of it. The rule was refused.

I know that the very learned gentleman, who brought this before the Court, was desirous to have their opinion on it, as his own sentiments were similar to those pronounced by Lord *Ellenborough*; but a decision respecting which became extremely material, as similar cases must frequently occur in practice:

An action was brought on a policy of insurance on the *American* ship, the *Maryland Mary*, at and from *Gibraltar* to a market, with leave to call and land goods at two or more ports in the *Mediterranean*. The ship having landed some goods at *Malta*, proceeded from thence on the 17th of *May* 1807, with the rest of her cargo for *Smyrna*, but was the same day captured by a *Russian* privateer, and being afterwards carried into *Corfu* was there condemned as lawful prize.

Donaldson
v. Thomson,
x Campbell,
419.

The defence set up by the underwriters was, that this *American* ship, by sailing for *Smyrna*, had violated the laws of neutrality; as that port was then blockaded by the *Russians*. However the only evidence adduced to shew that the captain knew of the blockade before he left *Malta*, was the sentence of condemnation, in which this fact was positively averred. Upon the validity of this sentence, therefore, the cause intirely depended. It was pronounced by a prize commission which sat in *Corfu* in *July* 1807, by the authority of the Emperor of *Russia*.

The plaintiff's counsel contended, on the authority of the case of the *Fiad Oyen*, 1 Rob.Rep. 144. that the supposed court could have no legitimate jurisdiction where it sat, and that its sentence was a nullity. *Corfu* was one of the islands which formed the *Ionian* republic, an independent government, recognized by the peace of *Amiens*, and which continued to preserve its neutrality amidst the struggles of the surrounding states. A belligerent, therefore, could have no right to hold a prize court there consistently with the principles of the law of nations.

On the other side it was admitted, that if *Corfu* was to be considered as being at the time of the condemnation an independent neutral state, the sentence could not be supported. But they undertook to prove that it was substantially part of the territory of the *Russian* empire; and they insisted that this must be taken to be the case, if the *Russian* power was there dominant; if the supreme authority was vested in the *Russian* commander, although there might still be kept up some empty form of an imaginary republic.

The condition of *Corfu*, in July 1807, was described by a gentleman who had acted there as *English* consul. He stated, that at the time there was a *Russian* garrison in *Corfu*, and the *Russians* had about 6000 men in the different islands of the republic; that they had made *Corfu* a military station for four or five years; and that they continued in possession of it till the peace of *Tilsit*, when they delivered it up to *Bonaparte*: but that, previously to that event, the flag of the *Ionian* republic flew from the forts in the island; there was a port admiral appointed by the *Ionian* republic; a consul from the Sublime Porte resided at *Corfu*, and the witness was recognized as *English* consul by the prince and senate of the *Ionian* republic, who continued in their functions till the republican government was dissolved by the *French*.

Lord *Ellenborough*.—"I will not receive the sentence under these circumstances, the *Russians* must be considered as visitors in *Corfu*, and not as sovereigns. While a government subsists as this did; we cannot look to the degree in which it might be overawed by a foreign force. The sentence was pronounced by a belligerent on neutral territory, and is therefore void. I am by no means disposed to extend the comity, which has been shewn to these sentences of foreign admiralty courts, I shall die like Lord *Thurlow* in the belief, that they ought never to have been admitted. The doctrine in their favour rests upon an authority in *Showers* (a), which does not fully support it, and the practice of receiving them of ten leads in its consequences to the greatest injustice."

(a) *Hughes v. Cornetier*, 2 *Show*. 232.

In the ensuing term, application was made to the Court to set aside this verdict, on the ground that the sentence of the *Russian* prize court had been improperly rejected. It was contended that *Corfu*, when occupied in the manner above-described by the *Russian* troops, was either to be considered as a part of the *Russian* empire, or as a co-belligerent with *Russia* against the Porte, since the Emperor of *Russia* derived the same advantages in a military point of view from this occupation of the island, as if he had seized it hostilely, or the *Ionian* republic had been his ally in the war he was carrying on. A rule nisi was reluctantly granted: but cause being shewn it was discharged.

Lord *Ellenborough*.—"It is impossible to say that the government of the *Ionian* republic was superseded at a time, when its institutions subsisted, and its supremacy was recognized. How, then, was *Corfu* a co-belligerent? Only because it endured an hostile aggression. Will any one contend that a government which is obliged to yield in any quarter to a superior force, becomes a co-belligerent with the powers to which it yields? It may as well be contended, that neutral and belligerent mean the same thing. Indeed this would make us co-belligerents with *France*, because we receded from *Corunna*."

In this case the policy was in the usual form on goods on board the *Volga*, "at and from *Hull* to the *Sound* and *St. Petersburg*, including the risk in craft from *Cronstadt*, with a memorandum in the margin of the policy, that in case of partial loss or damage, the net proceeds were to be the basis of contribution." The loss was averred, in different counts, to have happened of the goods and of the voyage by the perils of enemies, and by the arrest, restraint, and detainment of kings, princes, and people. The *Volga* sailed with the goods on board with convoy from *Hull* on the 10th *October* 1807, to the *Sound*, where she arrived. On the 16th she proceeded on her voyage, and was at anchor off the town of *Drago* on the 20th, when she was boarded by the crew of a boat from His Majesty's brig *Muscata*, with orders from His Majesty's officers for the *Volga* to put herself under the command of the King's ships in *Copenhagen* roads, and the boat's crew remained on board to enforce obedience to the orders. The *Volga* weighed anchor accordingly, and came back to *Copenhagen* roads, where she remained until

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others v.
Christia, B.
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T. 49 Geo.
3.

the 31st, when she went to *Helsingberg* roads for convoy, and remained there waiting for convoy until *Saturday* the 7th *November*, when she sailed on her voyage under the convoy of His Majesty's fleet of war the *Ganet*. The *Volga* proceeded on her voyage in the *Baltic* till the 16th *November* when the commander of the *Ganet* informed the captain of the *Volga* that an embargo was laid on the 15th on all *British* ships and vessels in the *Russian* ports; he at the same time ordered the *Volga* to proceed no further on her voyage, but to keep close by him, and that the *Volga* should receive orders from the commander in chief in *Copenhagen* roads as to her future destination: when the *Volga* arrived off *Copenhagen* she was ordered by the King's officers to proceed down to *Helsingberg* roads, and afterwards the captain, under all the circumstances of the case, thought it best to proceed to *England*; which he did accordingly, under convoy of His Majesty's armed brig the *Providence*, and arrived at *Hull* on the 11th *December* 1807.

An embargo was in fact laid in the ports of *Russia* upon all *British* ships and vessels on the 15th day of *November* 1807, and war was declared, and hostilities commenced by the Emperor of *Russia* against *Great Britain* on the 18th *December* 1807, and hostilities have continued from that time to the present.

If the *Volga*, however, had not been detained by the King's officers she would have arrived according to the usual course of the voyage at *St. Petersburg* and delivered her cargo there previous to the laying on of the embargo.

Upon the ship's arrival in the *Humber*, the goods insured were safely landed and deposited in the same state as when first put on board in the warehouses of the plaintiffs' agents, where they remained when the action was brought. On the 28th *December* the plaintiffs abandoned the goods to the defendant and the other underwriters.

Lord *Ellenborough*.—"There is nothing in the case. Suppose there had been a detention by convoy; one ship sails faster than another; or suppose the winds and tides had been against them, as well might it be said, if the winds and waves had not been contrary, or if we had not been under convoy, we should

have arrived in sufficient time to avoid the effects of the embargo."

Judgment for the defendant.

This was an action on a policy of insurance made on the 20th of October 1807, on goods on board the ship *Susannah*, "from London to Helsingberg, the Sound, Copenhagen, all or either."

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Abbott.
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It appeared that, previous to such insurance, a great naval and military force had been sent from this country to *Copenhagen* for the purpose of taking possession of the *Danish* capital and the fleet lying in that port, and that the *British* armament had effected this purpose, and had possessed themselves of *Copenhagen* after a bombardment, which ended in a capitulation, by which it was agreed to be evacuated by the *British* forces on the 19th of October, though, in fact, owing to some unavoidable delay, the evacuation did not take place till the 20th, but the fact of such evacuation was of course unknown at the time of the policy being effected; and though intelligence of it had reached this country before the vessel sailed from the *Nore*, and though the captain admitted, on his examination at the trial, that he had heard the report, yet he swore he did not believe it. The government, however, having anticipated the probability of hostilities with *Denmark*, consequent on the expedition and seizure of the *Danish* fleet, an order of the King in council, issued on the 2d of September 1807, prohibiting the clearing of any *British* ship from this country for any port in the dominions of the King of *Denmark*: in consequence of which no clearance could have been obtained by this vessel for any such port. And therefore though the true object of the adventure was to carry out provisions for the *British* armament, then supposed to be at *Copenhagen* or *Elfsineur*, yet the captain on the 15th of October took a custom house clearance for *Helsingberg*, a *Swedish* and neutral port, to which he had no intention at the time to go; his consignees being *British* merchants at *Copenhagen* and *Elfsineur* and his bills of lading for the *Scund* and *Copenhagen*. It appeared to be usual at the custom house to take out a clearance for one only of the ports to which the ship was destined. The policy was effected on the 20th, and he sailed from the *Nore* on the 22d of October, and was captured by a *Danish* vessel on the 11th of November at the entrance of the Sound in his way to

Copenhagen, where he still expected to meet the *British* armament, and Mr. *Blanrock*, his consignee on board a ship off that port. The jury were satisfied of the honest intention of the assured and of the captain in this adventure, to supply the *British* armament with the provisions which were the subject of the insurance; and being advised by Lord *Ellenborough* that the insurance was not avoided by the custom house clearance having been taken out for *Helsingberg* under these circumstances, to which there was no contemplation at the time of proceeding, unless any circumstances should occur in the prosecution of the adventure to render it necessary, found a verdict for the plaintiff. Whereupon a rule was applied for in the last term for setting aside the verdict, and granting a new trial on the ground, that the taking out a custom house clearance for a place to which there was no intention of going in the course of the voyage, was such a fraud as avoided the policy. After this case was fully argued,

Lord *Ellenborough* said,—“I am perfectly satisfied, and so were the jury on the trial, that the voyage was not illegal either in intention or in act, but that the adventure was taken for the meretricious purpose of supplying the *British* fleet and forces, then understood to be in the possession of *Copenhagen*. And though an order of the King in council, contemplating that this kingdom might be placed in a state of warfare with *Denmark* in consequence of the measures then meditated or in execution, had issued on the 2d of *September*, preceding the policy in question, and though intelligence of the capitulation had been received in this country before the policy was effected, and the evacuation of *Copenhagen* was thus contemplated to take place on the 19th *October*, yet that will not affect the honesty or legality of the transaction. The adventure may be said to have begun on the 16th of *October*, when the vessel left her moorings in the river; the object of it was to supply the *British* fleet and forces engaged in the expedition to *Copenhagen* with provisions; and though the evacuation of the place was contemplated to take place on the 19th, yet circumstances might intervene to delay the departure of our forces, their provisions might be expected to be at a low ebb; the consignment was made, not to the subjects of *Denmark*, but to a *British* merchant at *Copenhagen*, who, if the evacuation had taken place at the time of the ship's arrival
was

was expected to be found on board a *British* ship off that port. There could then be no objection to the legality of the adventure, if the avowed object of it had been disclosed, and the ship had cleared out at once for *Copenhagen* at this period: but the order of council stood in the way of getting a clearance for *Copenhagen* which had been issued as a precautionary measure to prevent the vessels of this country from being detained in the *Danish* ports in the event of hostilities: to obviate this difficulty the clearance was taken out for *Helsingberg*, a *Swedish* port, without any purpose of defeating the order of council, or trading with any enemy. This is conditionally done upon adventures for supplying the *British* armies and fleets in foreign service. Nor is it to be taken for granted that in no event whatever was the ship to go into *Helsingberg* in the prosecution of this adventure. The captain had certainly no immediate intention of going there, but if he found that the *British* armament had left the *Danish* territories before his arrival, he might have found it expedient to proceed to the neighbouring *Swedish* port, which he was entitled to do within the terms of the policy. But I am satisfied that would not have made the insurance illegal if the captain had never meditated to go into *Helsingberg* at all. There is nothing illegal so as to avoid a policy in the mere circumstance of the ship taking out a clearance for a place named in the policy to which there is no intention of going. The statute of 13 & 14 Car. 2. c. 11. § 3. only gives a penalty of 100*l.* for taking out a false clearance; but there is nothing in that act to make the voyage illegal. That was determined in *Planche v. Fletcher*, Douglas, 251. and though the particular statute is not referred to in the report of the case, yet the provision of it was probably in the contemplation of the Court. And here the object of the voyage was not illegal but meretricious. The assured never meant to go to a *Danish* port, as such, but merely for the supply of the *British* fleet and army then supposed to be lying off *Copenhagen*. And the jury was quite satisfied of the fact."

Mr. Justice Grose declared himself of the same opinion.

Mr. Justice Le Blanc.—"If it had been made out in evidence, that this was a voyage intended to supply the enemy with provisions, that would at once have avoided the policy; but the defend-

defendant failed in his attempt to do that, and the jury were satisfied that that was not the object of the adventure. The obvious intention of it, and so it was understood by the jury, was to supply our own fleet and army off *Copenhagen*: and if on his approach to that place the captain had not found the fleet there, he would probably have gone to *Helsingberg*. It has been determined that the mere circumstance of taking a clearance to a place, where a ship does not intend to go, does not make the voyage illegal so as to vacate the policy: but I am not satisfied that the captain had determined not to go to *Helsingberg* in any event."

Mr. Justice Bayley.—"The whole of the evidence shews that the object of the voyage was to supply our fleet engaged upon the expedition to *Copenhagen*, with provisions, and not to run into an enemy's port, where the vessel would be sure to be captured."

Rule discharged.

APPENDIX, No. I.

Policy of Insurance on Ship or Goods.

In the Name of God, Amen.

as well in own Name, as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain, in Part or in All, doth make Assurance, and cause them and every of them to be insured, lost, or not lost, at and from

upon any Kind of Goods and Merchandizes, and also upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture, of and in the good Ship or Vessel called the

whereof is Master, under God, for this present Voyage,

or whosoever
 else shall go for Master in the said Ship, or by whatsoever other Name
 or Names the same Ship, or the Master thereof, is or shall be named
 or called; beginning the Adventure upon the said Goods and Mer-
 chandizes from the loading thereof aboard the said Ship,

Ship, &c.

and so shall continue and endure, during her Abode there, upon the said Ship, &c. And farther, until the said Ship, with alther Ordnance, Tackle, Apparel, &c. and Goods and Merchandizes whatsoever, shall be arrived at

Ship, &c. until she hath moored at Anchor Twenty-four Hours in good Safety; and upon the Goods and Merchandizes, until the same be there discharged and safely landed. And it shall be lawful for the said Ship, &c. in this Voyage, to proceed and fail to and touch and stay at any Ports and Places whatsoever

without Prejudice to this Insurance, the said Ship, &c. Goods and Merchandizes, &c. for so much as concerns the Assureds by Agreement between the Assureds and Assurers in this Policy are and shall be valued at

Touching the Adventures and Perils which we
the Assurers are contented to bear, and do take upon us in this Voyage, they

APPENDIX.

they are of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-mart, Surprizals, Takings at Sea, Arrests, Restraints, and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses and Misfortunes, that have or shall come to the Hurt, Detriment, or Damage, of the said Goods and Merchandizes and Ship, &c. or any Part thereof. And in Case of any Loss or Misfortune, it shall be lawful to the Assureds, their Factors, Servants, and Assigns, to sue, labour and travel for, in and about the Defence, Safeguard, and Recovery of the said Goods and Merchandize and Ship, &c. or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we the Assurers will contribute each one according to the Rate and Quantity of his Sum herein assured. And it is agreed by us the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in *Lombard-street*, or in the *Royal Exchange*, or elsewhere in *London*. And so we the Assurers are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods to the Assured, their Executors, Administrators and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured

at and after the Rate of

In Witness whereof we the Assurers have subscribed our Names and Sums assured in *London*.

N. B. Corn, Fish, Salt, Fruit, Flour, and Seed, are warranted free from Average, unless general, or the Ship be stranded: Sugar, Tobacco, Hemp, Flax, Hides, and Skins, are warranted free from Average, under Five Pounds *per Cent*. And all other Goods, also the Ship and Freight, are warranted free of Average under Three Pounds *per Cent*. unless general, or the Ship be stranded.

APPENDIX, No. II.

Form of a Respondentia-Bond.

KNOW all Men by these Presents, That

held and firmly bound to

in the Sum, or Penalty of
of good and lawful Money of
Great Britain, to be paid to the said
or to certain Attorney, Executors, Admi-
nistrators, or Assigns; to which Payment, well and truly to be
made Heirs, Executors, and Ad-
ministrators, firmly by these Presents, sealed with
Seal. Dated this

Day of in the Year of the
Reign of our Sovereign Lord by the Grace of
God, of *Great Britain, France, and Ireland*, King, Defender of the
Faith, and so forth, and in the Year of our Lord One thousand
eight hundred and The Condition
of the above-written Obligation is such, that whereas the above-
named hath, on the Day of the
Date above-written, lent unto the above-bound

the Sum of upon the Merchandize
and Effects, to that Value laden, or to be laden, on board the good
Ship or Vessel called the of the Burthen
of Tons or thereabouts, now in the River

Thames, whereof is Commander. If the said
Ship or Vessel do, and shall with all convenient Speed, proceed
and sail from and out of the said River of *Thames*, on a Voyage
to any Ports or Places in the *East Indies, China, Persia*, or else-
where beyond the *Cape of Good Hope*, and from thence, do and
shall sail and return unto the said River of *Thames*, at or before
the End and Expiration of Thirty-six Calendar Months, to be ac-
counted from the Day of the Date above-written, and that with-
out Deviation (the Dangers and Casualties of the seas excepted),
And if the above-bound

Heirs, Executors, or Administrators, do and shall, within

Days next after the said Ship, or Vessel, shall be
arrived in the said River of *Thames*, from the said Voyage, or at
the End and Expiration of the said Thirty-six Calendar Months,
to be accounted as aforesaid (which of the said Times shall first
and next happen) well and truly pay, or cause to be paid, unto the
above-named Executors, Administrators, or

Assigns, the Sum of

of lawful Money
of

of *Great Britain*, together with

of like Money, by the Calendar Month, and so proportionably for a greater or lesser Time than a Calendar Month, for all such Time, and so many Calendar Months, as shall be elapsed, and run out of the said Thirty-six Calendar Months, over and above twenty Calendar Months, to be accounted from the Day of the Date above-written; or if in the said Voyage, and within the said Thirty-six Calendar Months, to be accounted as aforesaid, an utter Loss of the said Ship, or Vessel, by Fire, Enemies, Men of War, or any other Casualties shall unavoidably happen; and the above-bound

Heirs, Executors, or Administrators, do and shall, within Six Months next after the Loss pay and satisfy to the said

Executors or Administrators, or Assigns, a just and proportional Average on all Goods and Effects which the said

carried from *England* on board the said Ship or Vessel, and on all other the Goods and Effects of the said which shall acquire during the said Voyage, and which shall not be unavoidably lost: then the above-written Obligation to be void, and of no Effect; or else to stand in full Force and Virtue.

Scaled and delivered (being
first duly stamped) in the
Presence of

J. S.

APPENDIX, No. III.

Form of a Policy of Insurance upon a Life.

In the Name of God, Amen.

do	make	Assurance, and
cause	to be assured upon	natural
Life	aged	for and during
the Term and Space of		

Calendar months, to commence this
Day of in the Year of our
Lord One thousand seven hundred and fully to be
complete and ended. And it is declared, that this Assurance is
made to and for the Use, Benefit, and Security, of the said

Executors, Administrators, and
Assigns, in case of the Death of the said
within

within the Time aforesaid, which the above Governor and Company do allow to be good and sufficient Ground and Inducement for making this Assurance, and do agree that the Life of

the said is and shall be rated and valued at the Sum assured: The said Governor and Company therefore, for and in Consideration of *per Cent.* to them paid, do assure, assume, and promise, that

the said shall, by the Permission of Almighty God, live, and continue in this natural Life, for and during the said Term and Space of *Calendar*

Months, to commence as aforesaid; or in Default thereof, that is to say, in case the said

shall, in or during the said Time, and before the full End and Expiration thereof, happen to die, or decease out of this World by any Way or Means whatsoever, then the aforesaid Governor and Company will well and truly satisfy, content, and pay unto the said

Executors, Administrators, or Assigns, the Sum or Sums of Money by them assured, and are here underwritten, hereby promising and binding themselves and their Successors to the Assured,

Executors, Administrators, or Assigns, for the true Performance of the Premises, confessing themselves paid the Consideration due unto them for this Assurance by the Assured. *Provided* always, and it is hereby declared to be the true Intent and Meaning of this Assurance, and this Policy is accepted by the said

upon Condition that the same shall be utterly void and of no Effect, in case the said

shall exceed the *Age* of or shall voluntarily go to *Sea* or into the *Wars*, by Sea or Land, without Licence in Writing first had or obtained for

so doing, any Thing in these Presents to the contrary hereof in anywise notwithstanding.

In witness whereof the said Governor and Company have caused their common Seal to be hereunto affixed, and the Sum or Sums by them assured to be here underwritten, at their office in *London*, this

Day of Year of the Reign of our Sovereign Lord

by the Grace of God, of the United Kingdom of *Great Britain and Ireland*, King, Defender of the Faith, &c. and in the Year of our Lord One thousand eight hundred and

The said Governor and Company are content with this Assurance for £.

APPENDIX, No. IV.

Form of a Policy of Insurance against Fire.

BY the Corporation of the *Royal Exchange Assurance*
of Houses and Goods from Fire

This present Instrument or Policy of Assurance witnesseth, That
whereas
agreed to pay into the Treasury of the Corporation of the *Royal Exchange Assurance*, at their Office on the *Royal Exchange, London*,
for the Assurance of
from Loss or Damage by Fire. *Now know all Men by these Presents*,
That the capital Stock, Estate, and Securities of the said Corporation shall be subject and liable to pay, make good, and satisfy
unto the said Assured Heirs, Executors,
or Administrators, any Loss or Damage which shall or may happen
by Fire to the said Goods aforesaid
(except such Goods as Hemp, Flax, Tallow, Pitch, Tar, Turpentine, Glass, China, and Earthen Wares, Writings, Books of Accounts, Notes, Bills, Bonds, Tallies, ready Money, Jewels, Plate, Pictures, Gun-powder, Hay, Straw, and Corn unthreshed),
within the Space of twelve Calendar Months from the Day of the Date of this Instrument or Policy of Assurance, not exceeding the Sum of

and shall so continue, remain, and be subject and liable, as aforesaid,
from Year to Year, to be computed from the
Day of in every Year, for so long Time as the said
Assured shall well and truly pay, or cause to be paid, the Sum of
into the Treasury of the said Corporation, on or before the Day of
which shall be in each succeeding Year, and the said Corporation shall agree thereto by accepting and receiving the same; which said Loss or Damage shall be paid in Money immediately after the same shall be settled and adjusted, or otherwise, if the said Loss or Damage shall not be adjusted, settled, and paid within sixty Days after Notice thereof shall be given to the said Corporation, by the said Assured, that then the said Corporation, their Officers, Workmen, or Assigns, shall, at the Charge of the said Corporation, at the End and Expiration of the said sixty Days, provide and supply the said Assured with the like Quantity of Goods of the same Sort and Kind,
and

and of equal Value and Goodness with those burnt or damaged by Fire. *Provided always nevertheless,* and it is hereby declared to be the true Intent and Meaning of this Deed or Policy, That the said Stock, Estate, and Securities of the said Corporation shall not be subject or liable to pay or make good to the Assured any Loss or Damage by Fire, which shall happen by any Invasion, Foreign Enemy, or any military or usurped Power whatsoever. *Provided also,* That this Deed or Policy shall not take Place or be binding to the said Corporation until the Premium for one Year is paid, or in case the said Assured shall have already made, or shall hereafter make any other Assurance upon the Goods aforesaid, unless the same shall be allowed of and specified upon the Back of this Policy: or if the said

at the Time when any

such Fire shall happen, shall be in the Possession of, or let to any Person who shall use or exercise therein the Trade of a Sugar-baker, Apothecary, Chymist, Colour-man, Distiller, Bread or Biscuit-baker, Ship or Tallow-chandler, Stable keeper, Innholder, or Maltster, or shall be made use of for the stowing or keeping of Hemp, Flax, Tallow, Pitch, Tar, or Turpentine; but that in all or any of the said Cases these Presents, and every Clause, Article, and Thing herein contained, shall cease, determine, and be utterly void and of none Effect, or otherwise shall remain in full Force and Virtue. In Witness whereof the said Corporation have caused their common Seal to be herunto affixed, the

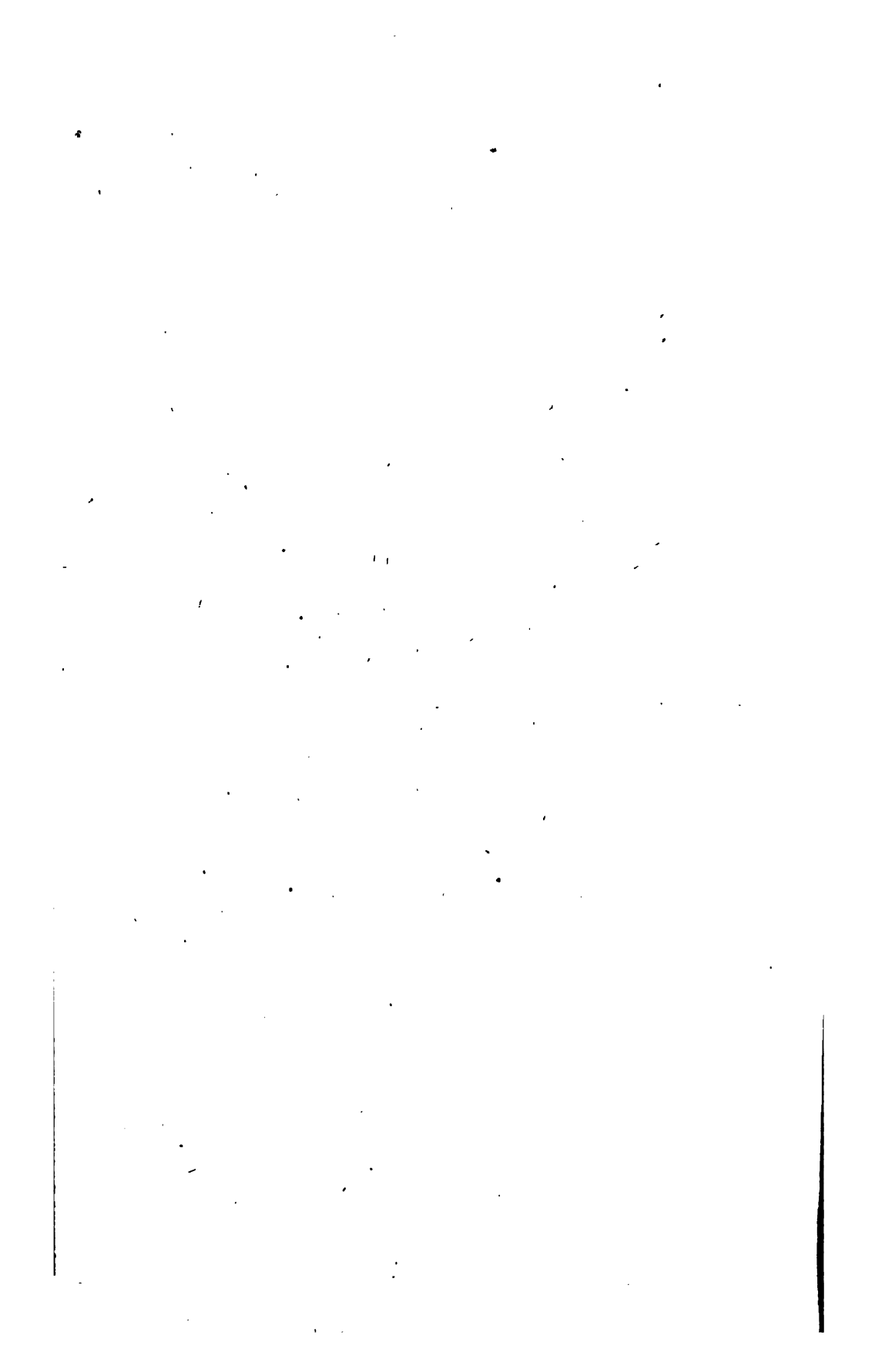
Day of

the

Year of the Reign of our

Sovereign Lord by the Grace of God, of the United Kingdom of Great Britain, and Ireland, King, Defender of the Faith, &c. and in the Year of our Lord One thousand eight hundred and

N. B. This Policy to be of no Force, if assigned; unless such Assignment be allowed by an Entry thereof in the Books of the Company.



T A B L E

OF THE

P R I N C I P A L M A T T E R S.

Abandonment.

BEFORE a person insured can demand from the underwriter a recompence for a total loss, he must abandon to him whatever claims he may have to the property insured.

Page 109, 192

The time, within which such an abandonment must be made, was not fixed in *England* till lately by any positive regulation or decision. 110, 239

Abandonment is as ancient as the contract of insurance itself. 192

When an abandonment is made, it must be total, and not partial. *ibid.*

The insured may in all cases chuse not to abandon; but he cannot at his pleasure abandon, and thereby turn a partial into a total loss. 193

The insured may abandon to the underwriter, and call upon him for a total loss, if the damage exceed half the value; if the voyage be absolutely lost or not worth pursuing; if farther expence be necessary; or if the insurer will not engage at all events to bear that expence, though it should exceed the value, or fail of success. 194, 201, 208

But he cannot abandon, unless at some period or other of the voyage there has been a total loss; and if neither the thing insured, nor the voyage be lost, and the damage does not amount to a moiety of the value, he shall not be allowed to abandon. 195, 217

Abandonment must be made, though the property be converted into money. 240

The right to abandon must depend on the nature of the case at the time of the action brought, or at the time of the offer to abandon; and therefore

if, at the time advice is received of the loss, it appears that the peril is over and the thing in safety, the insured has no right to abandon. *P. 195, 207*

Thus in a case where there was a capture and recapture, and it was stated that, at the time of the offer to abandon, the ship was safe in port, and had sustained no damage, the court held that the insured had no right to abandon. 205

But if the underwriter pay for a total loss, and it afterwards turn out to be but partial, the insured shall not be obliged to refund; but the insurer shall stand in his place for the benefit of salvage. 212

If the ship or goods are restored in safety between the offer to abandon, and action brought, the assured cannot proceed as for a total loss. 213

If the voyage be defeated by damage done to the ship, the assured may abandon 221

It is not a loss within the policy, for which the assured can abandon, and recover as for a total loss of cargo, that the port of destination has been shut by order of the enemy against ships of the nation to which the ship insured belongs. 223

If a ship, finding her port of destination shut, sail back for her port of outfit, without intending to complete the voyage insured, the underwriters are discharged. 225, 613

Where ship and freight are insured by two separate sets of underwriters, and by reason of an embargo in a foreign port, there is an abandonment to both, whether the underwriters on ship are entitled to *freight* earned in consequence of the embargo being taken off? From p. 227 to p. 236

Election to abandon, when to be made.

Page 239

When notice of abandonment of a cargo must be given, to render the underwriters liable for a total loss, 156

Notice of abandonment necessary, though the ship and cargo had been sold, when notice of the loss was received. 240 note (a)

Action.

Action of *assumpsit* may be maintained by owner of ship against owner of part of the cargo, to recover proportion of general average. 179 note (a)

An action on the case lies against an agent for not having insured agreeably to the orders of his principal.

404 note (a)

The only difference between this action, and that on the policy against the underwriters, consists in form: for the plaintiff is entitled in this action to recover the precise sum he ordered to be insured; and the defendant has every benefit of which the underwriter could have taken advantage, such as fraud, deviation, non-compliance with warranty, &c. *ibid.*

Such an order to insure must be obeyed in the three following instances, otherwise this action will lie. First, where a merchant abroad has effects in the hands of his correspondent here. Second, where the merchant abroad has been used to send orders for insurance, and the one here to comply with them. Thirdly, if the merchant abroad send bills of lading, and engraft on them an order to insure, as the term of their acceptance. *ibid.*

If a merchant here accept an order for insurance, and limit the broker to too small a premium, by which means no insurance can be procured, this action lies. *ibid.*

An action of *indebitatus assumpsit*, for money had and received for the plaintiff's use, is the proper form of action, in order to recover the premium. 504, 537

In order to recover upon a policy against either of the insurance companies, the

action must be *debt* or *covenant*, and they may plead generally.

Page 535, 536

When money has been paid by mistake to be insured, it may be recovered back in an action for money had and received to the plaintiff's use. 537

In order to recover against a private underwriter upon the policy, the form of action is a special *indebitatus assumpsit*, founded upon the express contract. *ibid.*

The action may be brought in the name of the broker effecting the policy.

543

Within fifteen days after action brought, plaintiff, after request in writing, must declare the amount of all insurances on the same ship. 544

See title *Declaration*.

Adjustment.

When the quantity of damage sustained in the course of the voyage is known, and the amount which each insurer is to pay is settled, it is usual for the underwriter to indorse on the policy, "adjusted this loss at so much per cent." This is an adjustment. 161

After an adjustment has been signed by the underwriter, if he refuse to pay, the owner has no occasion to go into the proof of his loss, or any of the circumstances. It is to be considered as a note of hand. 162

This rule has been since relaxed and explained. 163

Although an underwriter sign an adjustment, until he actually pays the loss he may avail himself of any defence, either upon the facts or the law of the case. 165

At least, unless his attention was particularly called to all the circumstances of the case, before he signed the adjustment. 166

After judgment by default upon a valued policy, the plaintiff's title to recover is confessed, and the amount of the damage is fixed by the policy. 167

If a loss be total at the time of the adjustment, and the insurer pay for a total

total loss, the insured is not obliged to refund, if it should afterwards turn out to be partial; but the insurer will stand in the place of the insured

Page 16;

Admiralty.

The sentence of a *French* consul resident in a neutral country upon a ship brought in there, is void by the law of nations. *ibid.*

But sentence procured by captors in country of co-belligerent, good. 463

The sentence of a foreign Court of Admiralty is conclusive, as to every thing contained in it; but where the cause of condemnation of a ship does not appear to be on the specific ground material to the point in issue, parole evidence must be allowed to explain it. 464

Thus it is not conclusive to shew that a ship was not neutral, unless it appeared that the condemnation went on that ground. *ibid.*

A sentence of such a court cannot be controverted collaterally in a civil suit. 466

If it appear evident that the sentence proceeded upon the ground of the property not being neutral, that is conclusive evidence against the insured, that he has not complied with his warranty, and the underwriter is discharged. 469, 470

Even where no special ground of condemnation is stated, but the ship is condemned as good and lawful prize, the Court here must consider it as conclusive evidence that the property was not neutral. 471

If a foreign Court condemn a neutral as *enemy's property* for not having a list of the crew required by a *French* ordinance, and *adjudge it to be requisite within the construction of the treaty* between the countries, such sentence is conclusive. 472

Sailing without passport as required by treaties between *America* and other states is a non-compliance with a

warranty of being an *American*.

Page 473, note (a)

If a neutral ship be restored, but damages and costs denied to the claimants, because they had not fully complied with certain *French* ordinances, the assured may recover for the detention notwithstanding.

474, note (a)

But if the ground of decision appear to be not on the ground of not being neutral, but on a foreign ordinance, manifestly unjust, and contrary to the laws of nations, and the insured has only infringed such a partial law, that shall not be deemed a breach of his warranty, so as to discharge the insurer. 473

The only question in all these cases is this, did the Court of Admiralty mean to decide the question whether the property belonged to an enemy or not? if they did mean to decide that question, though they may have decided erroneously, it is conclusive evidence, that the warranty is not true; and the assured cannot be allowed to controvert the fact so established.

474, 497

Where a foreign sentence professes to proceed on an infraction of treaty, such sentence conclusive against warranty. 486

Foreign sentence evidence only of what it directly asserts in the adjudicative part of it. 495

If the ship be condemned as prize, and the grounds of the sentence appear manifestly to contradict such a conclusion, the Court here will not discharge the insurers, by declaring that the insured has forfeited his neutrality. 498

A ship warranted neutral forfeits her neutrality, if a Court of Admiralty condemn her on that ground for refusing to be searched. 500

Proceedings in Admiralty Court can only be proved by producing the proceedings under the seal of that court. 502

Condemnation upon survey not evidence of the facts stated in it. 548

Agent.

Where an agent is proved to have had authority to subscribe the policy, he shall be presumed to have authority to sign the adjustment. Page 162

Wherever there has been an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself who is interested, or of his agent; for in either case the contract is founded in deception, and the policy is consequently void.

276, 278

This rule prevails, even though the act cannot be at all traced to the owner of the property insured.

276

Agent not insuring according to directions is liable to an action.

404

*Alien. See Enemy.**Alteration.*

A policy cannot be altered after it is signed.

1

Unless there be some written document to shew that the intention of the parties was mistaken; or unless it be altered by consent of the parties.

3

In what cases alteration of policy permitted by 35 Geo. 3. c. 63. p. 37, 38, 39.

Amalfitan Code.

Some account of it. Introd. p. xxiv.

Apportionment.

See Return of Premium.

Arbitration,

Effect of Clause of, in a Policy.

535

Arrival.

See titles, Risk, Continuance of Risk, and Construction of Policy.

Assignment.

Policies of insurance against fire are not assignable without consent of the office.

595

But in marine insurances, the policy may be transferred.

Page 596, note (a)

Assumpsit. See Action.

Assurance. See Insurance.

Average, General.

When goods are thrown overboard in a storm to lighten the ship, for the general safety of the ship and cargo, the owners of the ship and of the goods saved, are to contribute for the relief of those whose goods are ejected: this contribution is called a general average.

133, 170

Average and contribution in commercial writers are synonymous terms.

170

All loss which arises in consequence of extraordinary sacrifices or expences incurred for the preservation of the ship and cargo comes within the description of general average.

170

The doctrine of average was introduced by the Rhodians.

171

Three things, it is said, must concur to make the act of throwing goods overboard legal: 1st, That what is so condemned to destruction be in consequence of a deliberate and voluntary consultation between the master and men. 2d, That the ship be in distress, and that sacrificing a part be necessary for the preservation of the rest. 3d, That the saving of the ship and cargo be owing to the means used with that view. But the 2d seems to be the only material one.

171

To an action of trespass for throwing goods overboard a man pleaded that he did it *navis levandæ causâ*; and that otherwise the passengers must have perished. The plea was held good.

172

If the *jettison* (that is, the throwing over of the goods) do not save the ship, but she perish in the storm, there shall be no contribution of such goods as may happen to be saved.

ibid.

But if the ship, being once preserved by such means, be afterwards lost, the

property saved from the second accident shall contribute to the loss occasioned by the former jettison. *Page 172*

The various accidents and charges, which will entitle the suffering party to call for a contribution, enumerated. *173*

If goods be put on board a lighter, to enable the ship to sail into a harbour, and the lighter perish, the owners of the ship and the remaining cargo are to contribute. *ibid.*

But if the ship be lost, and the lighter saved, the owners of the goods preserved are not to contribute. *ibid.*

Not only the value of the goods thrown overboard must be considered in a general average; but also the value of such as receive any damage by wet, &c. from the jettison of the rest. *ibid.*

If a ship be taken and carried into port, and the crew remain to take care of and reclaim her, the charges of reclaiming and the wages and expences of the ship's company during her arrest, and from the time of her capture, it is said, shall be brought into a general average. *Qu. 174*

Not so for sailors' wages and provisions, during performance of a quarantine. *ibid.*

Quers. Whether extraordinary wages and victuals, during a detention by a foreign prince, not at war, be a subject of average. *174, 175*

It seems that wages, &c. during a detention to repair, are. *Qu. ibid.*

So where a ship is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading, and the wages and provisions of the workmen hired for the repairs, are a general average. *175*

Diamonds and jewels, when a part of the cargo, must contribute according to their value. *175, 177*

Ship provisions, the persons of the passengers, wearing apparel, and such jewels as merely belong to the person, do not contribute. *176*

Nor do bottomry or respondentia bonds in *England*. *176, 563*

Nor the wages of the sailors. *Page 176*

In order to fix a right sum on which the average may be computed, we should consider what the whole ship, freight and cargo, would have produced neat, if no jettison had been made; and then the ship, freight, and cargo are to bear an equal and proportional part of the loss. *ibid.*

The goods thrown overboard are to be estimated at the price for which the goods saved were sold, freight and all other charges being first deducted. *177*

The contribution is, in general, not made till the ship's arrival at the port of discharge. *178*

The insurer by his contract engages to indemnify the insured against all losses arising from a general average. *ibid.*

Contribution may be enforced in a Court of Equity. *179*

Or an action at law may be maintained for it. *179. note (a)*

Average Loss, vide Partial Losses.

Bankruptcy.

IF the original insurer become a bankrupt, it shall be lawful for him or his assigns to make a re-assurance to the amount before by him insured, provided it be expressed in the policy to be a re-assurance. *370*

The act was held to prohibit re-assurances on foreign ships, except in the case of bankruptcy or death of the first insurer. *372*

If the insurer, after the writing of the policy and before a loss happen, should become a bankrupt, the insured may prove his debt under the commission, as if the loss had happened previous to the bankruptcy of the underwriter. *371. note (a)*

This statute has been held to extend to insurances upon lives. *580*

If the borrower on bottomry becomes bankrupt after the loan of the money, and before the event happens, which entitles the lender to repayment, the lender may prove his debt under

under the commission, as if the event had actually happened. Page 569

Barratry.

It is barratry in the master to smuggle on his own account. 41

The derivation of the word "*barratry*" is very doubtful. 111

Any act of the master, or mariners, of a criminal nature, or which is grossly negligent, tending to their own benefit, to the prejudice of the owners of the ship, and without their consent or privity, is barratry. *ibid.*

It must be some breach of trust in the master *ex malificio*. 115. (n)

There must be something fraudulent to constitute barratry 121

It is not necessary, in order to make the insurers liable, that the loss should happen *in the very act of barratry*; for the moment the ship is carried from its proper track, with an evil intent, barratry is committed. 112, 119

But the loss in consequence of the act of barratry must happen *during the voyage insured*, and within the time limited in the policy. 42, 112

If the act of the captain be done for the benefit of his owners, and not with a view to his own interest, it is not barratry. 112

If the owner of the ship freight it out for a specific voyage, the freighter is to be considered as owner *pro hac vice*; and if the master commit a criminal act, without his privity, though with the knowledge of the original owner, it is barratry. 112, 118

The insurers, by express words, undertake generally for the barratry of the master and mariners. 113

If a declaration state a ship to have been lost by the *fraud and negligence* of the master, that is a sufficient averment of a loss by *barratry*. *ibid.*

But where a ship sailed a different course from that first intended, which alteration was publicly notified before the ship sailed, and where the master was to have no benefit by the change, it was held not to be barratry, 114

So if a ship take a prize, and, instead of proceeding on her voyage, the captain is forced by the mariners to return to port with the prize, against the orders of his owners, the captain is justified by necessity; and it is not barratry, because not done to defraud the owners. Page 115

A ship was insured from London to Seville; she was let to freight for the voyage; she sailed from London to the Downs, from thence she sailed to Guernsey, which was out of the course of the voyage. The captain went there to take in brandy on his own account, with the knowledge of the original owner of the ship, but not of the freighter for that voyage. This was held to be barratry. 116

A breach of an embargo is an act of barratry in the master. 120

If the captain cruise for, and take a prize, contrary to his owner's instructions, it is barratry. *ibid.*

If the master trade with the enemy, even with a view to the advantage of his owners, this is barratry. 121

An act of the captain, with the knowledge of the owners of the ship, though without the privity of the owner of the goods, who happened to be the person insured, is not barratry. 125

If the master of the ship be also the owner, he cannot be guilty of barratry. 127

The same rule prevails, if he commit an act, which would be barratry in any other master, even though he has mortgaged the ship. 128

The onus of proving the captain to be owner, lies upon the underwriter. *ibid.*

If the words "*in any lawful trade*" be inserted, still the underwriters are answerable, if the captain commit barratry by smuggling on his own account. 129

If any captain, or mariner, belonging to any ship, shall wilfully burn or destroy her, to the prejudice of any merchant loading goods thereon, or of any person underwriting any policy thereon, or to the prejudice of the owner of the ship, he shall suffer death

death as a felon, without benefit of clergy. Page 130

If the offence be committed within the body of a county, the offender shall be tried in a court of common law; if upon the high seas, it shall be tried according to the directions of the 28th Henry 8, c. 15. 130, 131

It should seem a lender on bottomry would not be liable for any accident arising from the barratry of the master. 563

Bill of Lading. See Lading.

Bottomry and Respondentia.

Bottomry is a contract, by which the owner of a ship borrows money to enable him to carry on the voyage, and pledges the keel or bottom of the ship as a security for the repayment. 552

If the ship be lost, the lender also loses his whole money; but if not, he shall receive his principal and the stipulated interest, however it exceed the legal rate. *ibid.*

When the ship and tackle are brought home, they are liable, as well as the person of the borrower, for the money lent. *ibid.*

When the loan is not made upon the vessel, but upon the goods, then the borrower only is personally bound to answer the contract, who is said to take up money at respondentia. *ibid.*

In this consists the chief difference between bottomry and respondentia; in most other respects they are the same. *ibid.*

There is a third kind of contract upon the mere hazard of the voyage, without any interest in the ship or goods. *ibid.*

This is prohibited as to East India voyages. 553

The borrower on respondentia can only insure the surplus value of the goods over and above the money borrowed. 13

The lender alone can make insurance on the money lent. 553

All contracts made by any of his Majesty's subjects by way of bottomry on the ships of foreigners trading to the East Indies are null and void. Page 553

2. Whether an American ship, since the declaration of American independency, be a foreign ship within the statute? 554

Bottomry arose from the power given to the master of hypothecating the ship and goods for necessities in a foreign country. 555 & *ib.* note (a) But the ship must be abroad, and in a state of necessity to justify such an act of the master. *ibid.*

This species of contract was known to the Rhodians. 557

The principle, upon which bottomry is allowed, is, that the lender runs the risk of losing his principal and interest; and therefore it is not usury to take more than the legal rate. 558

If a contract were made, by color of bottomry, in order to evade the statute, it would be usurious. 561

The legality of the contract defended. *ibid.*

But if the risk be not run, the lender is not entitled to the extraordinary premium. 562

The risks, to which the lender exposes himself, are generally mentioned in the condition of the bond; and are nearly the same against which the underwriter in a policy of insurance undertakes to indemnify. 563

But the lender is not liable for accidents arising from the misconduct of the borrower. *ibid.*

Piracy is one of the risks which the lender on bottomry runs. *ibid.*

If a loss by capture happen, he cannot recover against the borrower. *ibid.*

But this does not mean a mere temporary taking; but it must be such as to occasion a total loss. *ibid.*

Therefore where a ship was taken and detained for a short time, and yet arrived at the port of destination within the time limited, it was held that the bond was not forfeited. 564

If the ship be lost by a wilful deviation from 10 from

from the track of the voyage, the event has not happened upon which the borrower was to be discharged from his obligation. *Page 565*

If the borrower becomes bankrupt after the loan of the money, and before the event happens, which entitles the lender to repayment, the lender may prove his debt under the commission, as if the event had actually happened. *569*

Bottomry and respondentia may be insured, provided it be specified to be such interest in the policy. *12, 570*

Unless the usage of trade sanctions a different proceeding. *12*

When a person insures a bottomry interest, and recovers upon the bond, he cannot also recover upon the policy. *570*

A lender on bottomry or at respondentia is neither entitled to benefit of salvage, nor liable to average by the law of *England*. *176, 564*

It is otherwise in *France*, and in *Denmark*. *565*

But if a man insure respondentia interest on a *Danish* ship, and be obliged to contribute to an average loss by the laws of *Denmark*, *English* underwriters are bound to indemnify. *Ibid*

Whether money may be lent on bottomry, or at respondentia to an enemy in time of war? *568*

Broker.

The broker, by the custom, is liable to be sued by the insurer for premiums, notwithstanding the acknowledgement by the insurer, in the policy, that he has received them. *33*

The broker may maintain an action against the insured, for premiums paid on his account. *34, 35*

The broker has a lien upon all the policies in his hands for his general balance. *543, note (b)*

See *Agent*.

Capture.

AS between the insurer and insured, the ship is to be considered as lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy, and the insurer must pay the value. *Page 88, 101*

If either before or after condemnation the owner retake her, and have paid salvage, the insurer must pay the loss so actually sustained. *88*

If the loss be paid by the underwriter before the recovery, he stands in the place of the insured, and will be entitled to the benefits of the restitution. *ibid.*

A capture having been illegal, but the charges and delay being great, the insured made a compromise, *bonâ fide* for the liberation of the ship; the underwriters were held to be answerable for the charges of that compromise. *89*

Before the statute of 19 *Geo. 2. ch. 37.* which abolished wager policies, the recapture had a considerable effect upon the contract of insurance. *92*

But now the contract is not at all altered between an insurer and an insured. *ibid.*

The opinions of foreign writers with respect to capture and recapture stated *93*

By the marine law of *England*, as practiced in the court of Admiralty, it was formerly held, that the property was not changed so as to bar the original owner in favour of a vendee or recaptor, till there had been a sentence of condemnation. *94, 188*

But now by statute this right of the original owner, in case of a recapture, is preserved to him for ever, upon the payment of stated salvage to the recaptors. *95, 188*

Before the stat. of 19 *Geo. 2. ch. 37.* several cases were determined upon the questions of recapture in the *Eng. lib* courts; but the same question can never again arise between an insurer and insured. *96 to 101*
11

If the ship be recovered before a demand for indemnity is made, the insurer is only liable for the amount of the loss actually sustained at the time of the demand. Page 101

Or, if the ship be restored at any time subsequent to the payment by the underwriter, he shall then stand in the place of the insured, and receive all the benefits resulting from such restitution. *ibid.*

See *Bottomry*.

Changing the Ship.

It being necessary, except in some special cases, to insert the name of the ship on which the risk is to be run in the policy, it follows as an implied condition, that the insured shall neither substitute another ship for that mentioned in the policy before the voyage commences; in which case there would be no contract at all; nor during the voyage remove the property insured from one ship to another, without consent of the insurer, or without an unavoidable necessity. 23, 383

If he do, the implied condition is broken, and he cannot, in case of loss, recover against the underwriter. *ibid.*

The ship on which the risk is to be run, forms a material part of the contract. *ibid.*

The opinions of *English* mercantile writers, and of foreign authors stated. 383, 384

Expressly held in *England* that the insured, except in cases of real necessity, have no right to change the bottom of the ship; for when an insurance is made on a specific ship, and the insured, without the consent of the underwriter, changes the ship, he has not kept his part of the contract. 385, 386

Cloaths.

The master's cloaths are not included under a general insurance on goods. 25

Commencement of the Risk.

On the goods, it is usually from the loading; on the ship, from the beginning to load. Page 27

On a policy, "at and from Bengal to England" the risk commences from the first arrival at Bengal. 51

So at and from Jamaica to London. 52

Compass (Mariner's.)

Invented by a native of *Amalfi*; and it contributed greatly to the revival of commerce. Intro. xxii.

Coin.

Whether insurable as goods. 25

Commission.

Whether commissions of a consignee of the cargo are insurable. 355

Concealment, see *Fraud*.

Condemnation, see *Admiralty*.

Consent.

A policy previous to the stamp duty on policies might have been altered by consent, even after it was signed. 3

Consolidation Rule.

For the history of the consolidation rule in insurance causes, see the Introduction, page xliii.

Construction of the Policy.

A policy must always be construed as nearly as possible, according to the intention of the contracting parties, and not according to the strict meaning of the words. 40, 62

As policies are to be liberally construed, whatever is done by the master in the usual course, for goods reasons, though a loss happen thereon, the insurer is liable. *ibid.*

No rule has been more frequently followed in questions of construction, than the usage of trade, with respect to the voyage insured. *ibid.*

A po-

- A policy on a ship generally from *A. to B.* was construed to mean till the ship was unloaded. Page 40. 41
- But if it contained the usual words "*till moored twenty-four hours in safety*;" the insurers shall be answerable for no loss that does not happen before the expiration of the time. 41
- Even though the loss was occasioned by an act committed during the voyage insured. *ibid.*
- If a ship be insured for six months, and three days before the expiration of the time, receive her death's wound, but by pumping is kept afloat till three days after the time, the insurer is discharged. 43
- The loss must happen during the continuance of the voyage, or within 24 hours after her mooring at the port of destination. 44
- Under a policy containing those words, the underwriters were held liable for a subsequent loss; because the captain the very day on which the ship arrived at her moorings, was served with an order from government to return in order to perform quarantine: and therefore the ship could not be said to have moored 24 hours *in safety*, although she did not go back for some days. 45
- In a policy upon *freight*, if an accident prevent the ship from sailing, the insured cannot recover the *freight*, which he *would have earned*, if she had completed her voyage. 46
- But if the policy be a *valued* policy, and part of the cargo be on board when such accident happens, the insured may recover to the whole amount. *ibid.*
- If a ship, from stress of weather, is in a decayed condition, and goes to the nearest place to rest, it is to be considered in the same light, as if she had been repaired at the very place from which the voyage was to commence, and no deviation from the terms of the policy. 50
- When a ship is insured, "*at and from Bengal to London*," the first arrival at Bengal is intended to be the commencement of the risk, 51
- When an insurance is "*at and from*," the ship is protected during her preparation for the voyage; but if all thoughts of the voyage be laid aside, the insurer is discharged. Page 51
- Where there was an insurance on the outward and homeward bound voyage, and the latter ran "*at and from Jamaica to London*;" it was held, that the homeward risk began when the ship moored at any part of the island, and that there the outward risk ended, and did not continue till she came to the last port of delivery. 52
- This case confirmed as to a policy *on the ship*, but the outward risk *on goods* continues till they are landed. *ibid.*
- In construing policies, the *strictum jus* or *apex juris*, is not to be the rule, but a liberal construction is to be adopted, and the usage of the trade called in to explain any doubts. 54
- Thus in an insurance on goods from Malaga to Gibraltar, and from thence to England or Holland, the parties having agreed that the goods might be unloaded at Gibraltar, and re-shipped in one or more British ship or ships, and it appearing in evidence that there was no British ship at Gibraltar, but the goods had been unloaded and put into a *store ship*, (which was always considered as a warehouse), the insurers were held to be liable for the loss of these goods in the store ship. 53
- A ship was insured from London to any place beyond the Cape of Good Hope. The ship arrived in the river Canton in China, where, in order to be beeled and refitted, the sails, &c. were taken out, and lodged in a *bank sail*, on an island in the river (which was proved to be usual, and beneficial to all concerned), the underwriter was held liable for the loss of the sails by fire, while in this *bank sail*. 55
- The insurer, at the time of underwriting, has under his consideration the nature of the voyage, and the usual manner of doing it. 56
- What is usually done by such a ship, with such a cargo, in such a voyage, 56

is understood to be referred to by every policy. Page 157

If a ship be driven a mile on shore by a hurricane, or be burnt in a dry dock, while repairing, the insurer is liable. *ibid.*

Every underwriter is presumed to be acquainted with the practice of the trade he insures. 59, 605

General rules for construction of policy. 62

When a man insures one species of property, he cannot recover damage occasioned by the loss of a species of property different from that named in the policy. 69

Under a policy upon the ship, or upon the goods, the insured cannot recover extraordinary wages paid to the seamen, or provisions expended, during a detention to repair, or a detention by an embargo. 69, 70

Nor is the underwriter on goods liable for the freight paid by the owner of the goods to the proprietors of the ship, where the goods were partially lost. 70, 71

In the construction of policies, the loss must be a direct and immediate consequence of the peril insured, and not a remote one, in order to entitle the insured to recover. 77

In the construction of a policy upon time, the same liberality prevails as in other cases; and an attention to the meaning of the contracting parties has always been paid. 79

In an insurance at and from Liverpool to Antigua, with liberty to cruise six weeks; it was held, that this meant a connected portion of time, and not a desultory cruising for six weeks at any time. *ibid.*

Of the Construction of East India Policies, see East India Voyages.

Of the Construction of Losses by Perils of the Sea, see Perils of the Sea.

Of the Construction of Losses by Capture, see Capture.

Of the Construction of Losses by Detention, see Detention.

Of the Construction of Losses by Barratry, see Barratry.

Consular Sentences, see Admiralty.

Continuance of the Risk.

On the ship till her arrival at the port of destination, and till she has been moored 24 hours in good safety for the purpose of unloading. Page 27, 52

On the goods till they are safely landed at the port of destination; which includes the carriage in the ship's boat to the shore, but not in the boat of the owner of the goods. 27

If a policy be general on a ship from A. to B. the underwriter has been held answerable till the ship is unloaded. 41

But if it contain the usual words "till moored 24 hours in safety;" the insurer is liable for no loss that does not happen before the expiration of that time. *ibid.*

Even though it be occasioned by an act done during the voyage insured. *ibid.*

If the master, during the voyage, commit an act of barratry by smuggling, and the ship be not seized till near a month after her arrival at the port of destination, the insurer is discharged. *ibid.*

If a ship be insured for six months, and three days before the expiration of that time receive her death's wound, but by pumping is kept afloat till three days after, the insurer is not liable. 43

But the ship cannot be said to have moored 24 hours in safety, when the very day, on which she arrives at her moorings, the Captain is served with an order to return to perform quarantine, although he does not obey for some days; and therefore the insurer is liable for a subsequent loss. 45

So if embargo laid on, and afterwards detained as prize. *ibid.*

Contra-

Contraband, see Prohibited Goods.

Contribution, see Average, General.

Convoy.

If the insured warrant that the vessel shall depart with convoy, and she do not; the policy is defeated.

Page 442

A convoy means a naval force, under the command of that person whom government may happen to appoint.

442, 444, 454

And this, whether government pleases to appoint a relay of convoy from place to place, or a convoy to a given latitude and no farther.

454

So also what is a convoy is governed by usage.

456

Where a ship put herself under the direction of a man of war till she should join the convoy, which had left the usual place of rendezvous before she arrived there, it was held not to be a departure with convoy, although she in fact joined and was lost in a storm.

443

Liter, if the single ship be a part of the convoy.

446

2. Whether sailing orders from the commander in chief to the particular ships are necessary to constitute a convoy?

444, 445

This seems now to be settled in the affirmative.

446

A convoy appointed by the admiral, commanding in chief upon a station abroad, is a convoy appointed by government.

448

A sailing with convoy from the usual place of rendezvous, as *Spithead* for the port of *London*, is a departure with convoy, within the meaning of such a warranty.

449

Although the words used, generally are "to depart," or to "sail with convoy;" yet it extends to sail with convoy throughout the voyage. *ibid.*

But an unforeseen separation from convoy is an accident, to which the underwriter is liable.

452

So held where a ship was separated from her convoy by storm, and by storm prevented from rejoining it, and was lost.

Page 452

Even where the ship has been prevented by tempestuous weather from joining the convoy, at least so as to receive the orders of the commodore, if she do every thing in her power to effect it, it shall be deemed a sailing with convoy.

453

Otherwise if the not joining be owing to the negligence and delay of the captain.

454

Ships belonging to *Great Britain* must now sail with convoy, except in particular cases.

456

What description of ship is exempted from the above regulation.

458

Corn

Is a general expression in the memorandum at the foot of the policy, and has been held to include *peas, beans* and *malt*.

149

Court.

The proper court for the trial of questions relative to policies of insurance is a court of common law.

532

Courts of equity have no jurisdiction over such questions.

ibid.

If indeed the trustee in a policy of insurance actually refuse his name to the *cestui que trust* in an action at law, that may be a ground of application to a court of equity.

534

So also an application may be made to a court of equity for a commission to examine witnesses residing abroad.

ibid.

It is also allowable, where fraud is suspected, to apply to equity, in order to procure a disclosure of circumstances upon the oath of the insured.

534, 535

But in all other cases, a court of common law is the proper forum.

ibid.

Even if the parties, by a clause in the policy, should agree to refer any dispute to arbitration, that will not oust the

the

the court of common law of its jurisdiction, unless a reference is in fact made, or is depending. Page 535

Court of Policies of Insurance.

The history of its origin and decline. Introd. xli.

Cruise.

A liberty to cruise six weeks means to give a permission to cruise for *six successive weeks*, and not a desultory cruising for forty-two days at any time. 79

Crusades.

They contributed to the revival of commerce. Introd. xxi.

Date.

THE day, month, and year, on which the policy was executed, must be inserted. 35

Declaration.

In order to entitle the insured to recover expences of salvage, it is not necessary to state them in the declaration, as a special breach of the policy. 189

Thus, in a declaration on a policy on goods, it stated that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled. Lord *Hardwicke* held, that under this declaration, the plaintiffs might give in evidence the expences of salvage. 189

A declaration on a policy of insurance must set out the policy, and aver that it was signed by the defendant; and that, in consideration of the premium, he undertook to indemnify the insured. 538

The declaration must then state the interest of the insured. 598, note (a)

It should next shew the loss to have happened by one of the perils mentioned in the policy; but it must state it according to the truth. 598

To aver that the loss happened by the fraud and negligence of the master is a sufficient averment of *barratry*. Page 538

In a declaration for a total, the insured may recover for a partial loss. 539

Though the plaintiff appear in proof to have a larger interest than is averred in the declaration, yet he is entitled to recover. 542. *ib.* note (a)

The general issue, *non assumpsit*, is the usual plea, except in the case of the corporations, to a declaration upon a policy. 545

The declaration need not state the clause in the policy to refer disputes to arbitration. 535

Destination.

Destination of the ship must be stated in the policy. 26

Detention.

The underwriter, by express words, undertakes to indemnify against all damages arising from the detention of kings, princes, or people. 102, 103
People means the governing power of the country. *ibid.*

A detention is said to be an arrest or embargo in time of war or peace, laid on by the publick authority of a state. *ibid.*

In case of an arrest or embargo by a prince, though not an enemy, the insured is entitled to recover against the insurer. *ibid.*

In case of detention by a foreign power, which in time of war may have seized a neutral ship, in order to be searched for enemy's property, the charges consequent thereon must be borne by the underwriter. 104

But a detention for non-payment of customs, or for navigating against the laws of those countries, where the ship happens to be, shall not fall upon the underwriter. 105

The insurers are liable for the payment of damage arising by the detention or seizure of ships, before the commencement of the voyage, where the risk is "at and from" by the government of

of the country where the ship loads.

Page 106.

British underwriter not liable for damages which owner of foreign vessel may sustain from embargo laid by *British* government on foreign ships.

109.

But where the assured is a subject of this country, he may recover against a *British* underwriter for the loss sustained by the detention of the *British* government.

ibid.

American citizen cannot claim from *English* underwriter, for loss occasioned by embargo of *American* government.

609

If an *American* consignee insures in *England* from his own country to this, and the ship is detained by an embargo there, the *English* consignee cannot recover upon the policy in respect of the advances he has made upon the cargo to the consignee.

ibid.

Before the insured can recover in case of detention, he must abandon to the insurer whatever claims he may have to the property insured.

109, 110

The time, within which the abandonment must be made in such cases was not till lately ascertained in *England* by any positive rule.

ibid.

A detention by particular ordinances, which contravene, or do not form a part of the law of nations, is a risk within a policy of insurance.

499, 500

Deviation

Is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the specific voyage insured.

387

Whenever this happens, the voyage is determined, and the insurers are discharged from any responsibility.

ibid.

The reason of this is, because the ship goes upon a different voyage from that against which the insurer undertook to indemnify

ibid.

It is not material whether the loss be or be not an actual consequence of the deviation; for the insurers are in no case answerable for a subsequent loss, in whatever place it happens, or to whatever cause it may be attributed.

Page 387

Neither does it make any difference whether the insured was or was not consenting to the deviation.

ibid.

A ship being insured from *Dunkirk* to *Leghorn*, comes to *Dover* for a *Mediterranean* pass; and it was held to be a deviation.

388

If the master of a vessel put into a port not usual, or say an unusual time, it is a deviation.

ibid.

The time a ship is detained in port for necessary repairs, the insurance being *at and from*, is not to be considered unnecessary delay, so as to avoid the policy.

388

Held, that where there is a policy on goods granting leave to *touch and stay* at a place, that confers no privilege on the assured to *break bulk* there.

ibid.

But an insurance on *ship and freight* is not vitiated by the ship taking in goods at a place into which she was forced by necessity, although there was no liberty to trade given by the policy.

389

If several places are named in the policy, the ship must go to those places in the order in which they are named, unless some usage, or some special facts be proved to vary the general rule.

393

An insurance from *A.* to *B. C. D.* and *E.* means a voyage to all or any of the places named; with this reserve, that if the ship goes to more than one of these places, she must visit them in the order described in the policy.

394

If the deviation be but for a single night, or for an hour, it is fatal.

395, 396

A ship was bound from *Cork* to *Jamaica*, under convoy. Being of force, she, with two other vessels, took advantage of the night, and cruized in hopes of meeting

meeting with a prize; it was held a deviation. *Page 396*

But if a merchant ship carry letters of marque, she may *chase* an enemy, though she may not *cruise*, without being deemed guilty of a deviation. *ibid.*

Liberty given to a merchant ship with a letter of marque, to *chase, capture, and man prizes* does not justify her in *lying to* for the purpose of protecting a prize as a convoy into port. *397*

2. Whether, in case of an insurance of merchant ship *with or without letters of marque*, she may chase vessels for the purpose of capture, provided the original pursuit commences from a point in the course of the voyage? *ibid.*

Liberty to a merchant ship *to see prizes into port*, does not authorize her to stay till they receive necessary repairs, which they could not otherwise procure. *398*

The doctrine of deviation is applicable to an insurance on *freight*. *399*

Wherever the deviation is occasioned by absolute necessity; as where the crew forced the captain to deviate, the underwriter continues liable. *ibid.*

The justifications for a deviation seem to be these; to repair the vessel: to avoid an impending storm; to escape from an enemy; or to seek for convoy. *400, 401*

If a ship is decayed, and goes to the nearest port to refit, it is no deviation. *401*

Wherever a ship, in order to escape a storm, goes out of the direct course: or, when in the due course of the voyage, is driven out of it by stress of weather; this is no deviation. *402, 403*

If a storm drive a ship out of the course of her voyage, and she do the best she can to get to her port of destination, she is not obliged to return to the point from which she was driven. *403, 404*

Where the excuse for a deviation in going into a port is, a necessity to

procure medical assistance for the captain and crew, the assured must shew that the ship was supplied with such medicines and instruments as were likely to be necessary in the course of the voyage. *Page 408, 409*

A deviation may also be justified, if done to avoid an enemy or to seek for convoy at the place of rendezvous. *Page 409*

A ship was insured from London to Gibraltar, warranted to depart with convoy. There was a convoy appointed for that trade at Spithead, but the ship was lost on her way thither. The court held that the ship was protected by the insurance to a place of general rendezvous. *ibid.*

Where a captain justifies a deviation by the usage of a particular trade, there must be a clear and established usage; not a few vague instances only. *411*

Wherever a ship does that, which is for the general benefit of all parties concerned, the act is as much within the spirit of the policy as if it had been expressed: and in order to say whether a deviation be justifiable or not, it will be proper to attend to the motives, end, and consequences, of the act, as the true ground of judgment. *ibid.*

It has been held, that if a ship deviate from necessity, the ship must pursue such *voyage of necessity* in the direct course, and in the shortest time possible, otherwise the underwriters will be discharged. *ibid.*

In such a case nothing more must be done than what the necessity requires. *415*

Even in an insurance on a trading voyage, such trade must be carried on with usual and reasonable expedition, *415*

A deviation *merely intended*, but never carried into effect, does not discharge the insurers. *417*

But if it can be shewn that the parties never intended to sail upon the voyage insured; if all the ship's papers be made out for a different place from that described in the policy; the insurers

surer is discharged, though the loss should happen before the dividing point of the two voyages. *Page 418*
 But where the *termini* of the voyage continue the same, an intention to go to an intermediate port, though the intention should be formed previous to the ship's sailing, will not vitiate till actual deviation. *420*

See also 420 note (a)

As it is settled that a mere intention to *violate* will not vacate the policy, follows as a consequence, and has been so held, that whatever damage happens before actual deviation, falls upon the underwriters. *421*

Subject to the rules already advanced, deviation or not is a question of fact to be decided according to the circumstances of the case. *ibid.*

In cases of deviation, the premium is not to be returned. *ibid.*

Double Insurance.

It is where the same man is to receive two sums instead of one; or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same property. *373*

Difference between a re-assurance and a double insurance. *ibid.*

Where a man makes a double insurance he may recover his loss against which set of underwriters he pleases; but he can recover for no more than the amount of his loss. *374*

But when one set of underwriters pay the loss, they may call upon the other underwriters to contribute in proportion to the sums they have insured. *ibid.*

But though a double insurance cannot be wholly supported, so as to enable a man to recover a two-fold satisfaction; yet various persons may insure various interests on the same thing, and each to the whole value; as the master for wages; the owner for freight; one person for goods; and another for bottomry. *375*

In what cases a man shall be said to make a double insurance; and when

not, fully considered from

Page 376 to 381.

If the same man for his own account, though not in his own name, insures doubly, it is still a double insurance. *378*

The laws of foreign countries, upon the subject of double insurance, are far from being uniform. *381*

East India Voyages.

THE usage of trade with respect to these voyages has been more notorious than in any other, the question having more frequently occurred. *64*

The charter-parties of the *India* Company give leave to prolong the ship's stay in *India* for a year, and it is common by a new agreement to detain her a year longer. The words of the policy too are very general without limitation of time or place. *ibid.*

These charter-parties are so notorious, and the course of the trade is so well known, that the underwriter is always liable for any intermediate voyage, upon which the ship may be sent, while in *India*, though not expressly mentioned in the policy. *64, 67*

In an insurance "from *London* to *Madras* and *Cbina*, with liberty to touch, stay, and trade, at any ports or places whatsoever," the facts were; that when the ship arrived at *Madras*, she was too late to go to *Cbina* that year, upon which she was sent by the council to *Bengal* to fetch rice, which voyage she performed once, but in the second attempt she was lost. The insurers are answerable on account of the usage. *66*

However, the parties may, by their own agreement, prevent such latitude of construction. *68*

Nor need this be done by express words of exclusion, but if, from the terms used, it can be collected that the parties meant so, that construction shall prevail. *ibid.*

Insu-

Insurance on a voyage undertaken in contravention of the rights of the *East India Company*, is void. Page 308.
How their rights are affected by the treaty with *America*. 309

Election.

Election to abandon, when to be made. 238, 239
Notice of abandonment must be given, though the ship and cargo have been sold. 240

Embargo.

An embargo is an arrest laid on ships or goods by public authority, to prevent ships from putting to sea in time of war, and sometimes also to exclude them from entering our ports.

103, 104

2. Whether a prince in time of war may make use of the vessels he finds in his ports, to assist him in carrying on war? 104

Extraordinary wages paid to the seamen during an embargo, cannot be recovered against the insurer *on the ship*.

71

The king of *Great Britain*, in time of war, may lay an embargo on shipping in the ports of his kingdom.

2. Whether he may do it in time of peace? 104

2. Whether, if an embargo be laid on by the *British* government, and a loss ensue, the underwriters are liable? 106, 107, 109 note (a)

The subjects of a foreign state cannot recover against an *English* underwriter for a loss occasioned by an embargo, or other act of their own government. 609

And if the foreign consignee cannot recover, because the loss is occasioned by the acts of his own government, the *English* consignee cannot apply the policy to his own benefit, in respect of advances he has made to the consignee. *ibid.*

The breach of an embargo is an act of barratry in the master. 120

If a ship, though neutral, be insured on

a voyage prohibited by an embargo, such an insurance is void. Page 311

Enemy.

The question whether insurances on the property of an enemy are polivie, considered. 16, 20

Such insurances are contrary to the law of *England*. *ibid.*

Trading with an enemy in time of actual war without the king's licence, is absolutely illegal. 316

But the licence may be qualified, and non-compliance with the requisitions of it will vitiate the policy, 317

What is necessary to be stated in a plea of alien enemy. 321, note (a)

Evidence.

Opinion of witnesses is not evidence.

80, 260

The *onus* of proving the captain to be owner, so as to get rid of a charge of barratry, lies upon the underwriters.

127

A policy will not be set aside on the ground of fraud, unless it be *fully* and *satisfactorily* proved, and the burthen of proof lies upon the person wishing to take advantage of the fraud. 282

But positive and direct proof of fraud is not to expected; and from the nature of the thing circumstantial evidence is all that can be given. *ibid.*

The nature of circumstantial evidence considered. 283

The sentence of a foreign court of Admiralty is conclusive, and binding upon all the world, as to every thing contained in it: and cannot be controverted collaterally in a civil suit.

464, 466

See Admiralty.

The first piece of evidence to support an action on the policy is proof of the defendant's hand-writing to the policy. 545

What sufficient evidence of an agent being authorized to sign policies. *ibid.* note (a)

ibid. note (a)
No

No parole evidence of any agreement shall be admitted, which tends to contradict the written policy. *Page* 546

The insured must also prove his interest in the thing insured, by a production of all the usual documents, bills of sale, bills of parcels, bills of lading, &c. *ibid.*

Captain's protest delivered by the broker to the assurers to get the loss settled is not evidence for the defendant. 547, 548

Nor a sentence of condemnation for non-seaworthiness alter a survey of the facts stated in it. 548

A man having purchased goods abroad, in order to prove his interest, produced a bill of parcels with the receipt of the seller to it, and proved his hand; it was held to be sufficient evidence. *ibid.*

The plaintiff must prove that a loss has happened by the very means stated in the declaration. *ibid.*

But where the loss is averred to be by perils of the sea, it is allowable to give the expence of the salvage in evidence upon such a declaration. 551

Factor.

THE lien which a factor has upon the goods of his principal, is such an interest as will entitle him to recover on a general policy on goods.

13, 379

Felony.

Wilfully to cast away, burn, or destroy, any ship to the prejudice of the owners of the said ship, or any merchant loading goods thereon, or of the underwriter, is felony, without the benefit of clergy, in any captain, master, mariner, or other officer belonging to the ship so destroyed.

130, 287

Any person boring holes in a ship in distress, or stealing a pump belonging thereto, shall be guilty of felony without benefit of clergy. 184

Persons convicted of stealing goods from a ship wrecked, or in distress, or of obstructing the escape of any person from a wreck, or of putting out false lights to lead such ship into danger, shall suffer as felons without benefit of clergy. *Page* 184

Where goods of small value are stolen, without any circumstances of cruelty, the offender may be indicted for petty larceny. *ibid.*

Persons, in whose custody ship-wrecked goods are found, not giving a satisfactory account, shall be committed to the common gaol for six months, or pay treble the value of such goods. *ibid.*

Goods offered to sale, suspected of being ship-wrecked, shall be stopped, and the person so offering them, and not giving a satisfactory account, shall be committed to the common gaol for six months, or pay treble the value of such goods. *ibid.*

Persons convicted of assaulting any magistrate or officer, when in discharge of his duty, respecting the preservation of any ship, vessel, goods, or effects, shall be liable to transportation for seven years. 186

Fire (insurance against)

Is a contract, by which the insurer undertakes, in consideration of the premium, to indemnify the insured against all losses, which he may sustain in his house or goods, by means of fire, within the time limited in the policy. 587

The London Assurance Company insert a clause in their proposals, by which they declare, that they do not hold themselves liable for any damage by fire, occasioned by an invasion, foreign enemy, or any military or usurped power whatsoever. 857

Under this proviso it was held, that the insurers were not exempted from loss by fire, occasioned by a mob at *Norwich*, which arose on account of the high price of provisions. 588

The Sun fire-office, in addition to these words

words add, "*civil commotion*;" it was held that the company, under those words, were exempted from losses occasioned by rioters, who rose in the year 1780, to compel the repeal of a statute, which had passed in favour of the *Roman catholics*.

Page 591

When a loss happens, the insured must give immediate notice of his loss; and as particular an account of the value, &c. as the nature of the case will admit. He must also produce a certificate of the minister and churchwardens, as to the character of the sufferer, and their belief of the truth of what he advances.

591

This certificate is held to be a *condition precedent* to his right of recovery.

595, note (a)

In insurances against fire, the loss may be either partial or total.

595

These policies are not in their nature assignable; nor can the interest in them be transferred without the consent of the office.

ibid.

When any person dies, the interest shall remain to the heir, executor, or administrator, respectively, to whom the property insured belongs; provided they procure their right to be indorsed on the policy, or the premium be paid in their name.

596.

It is necessary the party injured should have an interest or property in the house insured, at the time the policy is made out, and at the time the fire happens; and therefore, after the lease of the house is expired, the insured's assigning the policy does not oblige the insurers to make good the loss to the assignee.

ibid.

The premium upon common insurances is two shillings *per cent.* for any sum not exceeding 1000*l.* and half a crown from 1000*l.* upwards.

602

Besides which there is a duty to government of 2*s.* *per cent.*

ibid.

This tax does not extend to publick hospitals.

603

If a house were destroyed by a foreign enemy the day after the policy is

made, there would be no return of premium.

Page 603

Fraud vitiates this species of contract.

ibid.

Fire (*loss by*)

If the captain of a ship voluntarily burn her to prevent her from falling into the hands of the enemy, this is a loss by *fire* within the meaning of the policy.

51

Foreign Ships.

Insurances on foreign ships without interest are not within the statute of 19 *Geo.* 2. c. 37.

351

But re-assurances on foreign ships are void.

372

Fort.

A fort may be insured against an attack from an enemy, for the benefit of the governor.

15

France.

An account of its commercial and maritime regulations; and the distinguished authors, who have written upon the subject of insurances.

Intro*d.* xxxii.

Fraud.

Policies are annulled by the least shadow of fraud or undue concealment of facts.

242

Both parties are equally bound to disclose circumstances within their knowledge.

ibid.

If the insurer, at the time he underwrote, knew that the ship was safe arrived, the contract will be void.

ibid.

Cases of fraud upon this subject are liable to a threefold division; 1*st.* The *allegatio falsi*; 2*d.* The *suppressio veri*; 3*d.* Misrepresentation. The latter though it happen by mistake, if in a

z x 3

material

material part, will vitiate the policy as much as actual fraud. *P. 242, 243*
 The policy was held to be void, where goods were insured as the property of an ally, when in fact they were the goods of an enemy. *243*

A ship was known to have sailed from *Jamaica*, on the 24th of *November*; and the agent told the insurer she sailed the latter end of *December*; the policy was declared void. *244*

In an insurance upon goods, the insured warranted the ship and goods to be neutral; it was expressly found by the jury, that they were not neutral. The court, therefore, though the loss happened by storms, and not by capture, declared that the insured could not recover. *ibid.*

Goods were insured on board a ship, warranted *Portuguese*. The goods were lost by a different peril, but in fact the ship was not *Portuguese*. The policy is void *ab initio*. *245*

Concealment of circumstances vitiates all contracts of insurance. The facts upon which the risk is to be computed, lie, for the most part, within the knowledge of the insured only. The underwriter relies upon him for all necessary information; and must trust to him that he will conceal nothing, so as to make him form a wrong estimate. *246*

One having an account that a ship, described like his, was taken, insured her, without giving any notice to the insurers of what he had heard, the policy was decreed in equity to be delivered up. *247*

The agent for the plaintiff, two days before he effected the policy, received a letter from *Cowes*, in which is this expression: "On the 12th. of this month I was in company with the *Davy* (the ship in question,) at twelve at night lost sight of her all at once; the captain spoke to me the day before that she was leaky, and the next day we had a hard gale." The ship, however, rode out the gale, and was captured by the *Spaniards*. The policy was

held to be void, because the letter was not communicated to the insurer.

Page 247

A ship was insured "at and from *Genoa*." The ship loaded at *Lagbora* and was originally bound for *Dublin*; but losing her convoy, she put into *Genoa* in *August*, and lay there till the *January* following. All these facts were known to the insured, but not communicated to the insurer: the policy was held to be void. *248*

A ship being bound from the coast of *Africa* to the *British West Indies*, sailed from *St. Thomas's* on the coast of *Africa* on the 2d of *October*, a circumstance with which the plaintiff was acquainted by a letter received in *February*. The policy was not made till the 21st of *March*. The letter was not shewn, nor was any thing said of her sailing from *St. Thomas's*; but in the instructions "the ship was said to have been on the coast the 2d of *October*." The policy was held to be void. *249*

The broker's instructions stated the ship ready to sail on the 24th of *December*; the broker represented to the underwriter that the ship was in port, when, in fact, she had sailed the 23d of *December*. The policy was void. *250*

But there are many matters, as to which the insured may be innocently silent; 1st, As to what the insurer knows, however he came by that knowledge; 2d, As to what he ought to know; 3d, As to what lessens the risk. An underwriter is bound to know particular perils, as to the state of war or peace. *251*

If a privateer is insured, the underwriter need not be told her destination *ibid.*

An insurance was made on *Fort Marlborough* in the *East Indies* for twelve months against the attacks of an *European* enemy, for the benefit of the governor. The defence set up was an undue concealment of circumstances, particularly the weakness of the fort, and the probability of its being

being attacked by the *French*. The court held that the policy was good.

Page 251

The whole doctrine of concealment fully illustrated from page 251 to 264

In effecting insurance on homeward voyage, unnecessary to communicate letter from captain, stating that ship had received great damage on outward voyage, and stood in need of considerable repairs. 254, note (a)

An underwriter refused to pay a loss by capture, the ship being *Portuguese* and condemned for having an *English* supercargo on board, because the insured had not disclosed that circumstance. The court held that the condemnation was unjust, and was not such a circumstance as the insured was bound to disclose. 263

A representation is a state of the case, not forming a part of the written instrument of policy; and it is sufficient if it be substantially performed.

264, 270

If there be a misrepresentation, it will avoid the policy as a fraud, but not as a part of the agreement. 264

Even written instructions, if they are not inserted in the policy, are only to be considered as representations; and in order to make them valid and binding as a warranty, it is necessary that they make a part of the written instrument. 265

If a representation be false in any material point, it will avoid the policy; because the underwriter has computed the risk upon circumstances which did not exist. *ibid.*

These principles illustrated from page 265 to 272

If the misrepresentation be in a material point, it will avoid the policy; even though it happen by mistake. 272

The same rule holds if the broker conceal any thing material, though the only ground for not mentioning them should be that the facts concealed appeared immaterial to him, 274

But the thing concealed must be some fact, not a mere speculation or expectation of the insured. 275

Thus where a broker insuring several vessels, speaking of them all said, "which vessels are expected to leave the coast of *Africa*, in *November* or "*December*" the policy was held good, although in fact the ship in question had sailed in the month of *May* preceding. Page 257

Wherever there has been an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself who is interested, or of his agent; for in either case the contract is founded in deception, and the policy is consequently void. 276

This rule prevails, even though the act cannot be at all traced to the owner of the property insured. *ibid.*

How far what is said by the broker when the names of the underwriters are put upon a slip is to be considered a representation. 473, 616

A policy will not be set aside on the ground of fraud, unless it be fully and satisfactorily proved; and the burthen of proof lies on the person wishing to take advantage of the fraud. 282

But positive and direct proof of fraud is not to be expected; and from the nature of the thing, circumstantial evidence is all that can be given. *ibid.*

The question whether the premium is to be returned by the underwriter, where the insured has been guilty of fraud, considered. 283

The ordinances of foreign states declare for the most part, that it shall. *ibid.*

In *England* there has been no legislative regulation; and the courts of justice had not till lately adopted any general rule upon the subject. *ibid.*

In two or three instances, where the underwriters have been relieved in Chancery from the payment of the sums insured on account of fraud, the decree has directed the premium to be returned. *ibid.*

The question came on to be considered in the King's Bench; but the trial being had under a decree of the court of Chancery, and the insurer having there made an offer of returning the premium,

premium, the court of King's Bench considered this offer in the same light as if he had paid the money into court, and therefore the question remained undecided. *Page 285*

But in a case where the fraud was of a very gross and heinous nature, Lord Mansfield told the jury, that the premium should not be restored to the insured. *286*

In all cases of *actual* fraud on the part of the insured or his agent, the premium is not to be returned. *ibid.*

It is clear that if the underwriter has been guilty of fraud, an action lies against him at the suit of the insured, to recover the premium. *ibid.*

By several foreign ordinances, the punishment of fraud, in matters of insurance, is exceedingly severe; sometimes amounting even to death. *ibid.*

No punishment, except that of annulling the contract, has as yet been declared by the law of England. *287*

But if any captain, &c. wilfully destroy the ship to which he belongs, to the prejudice of the owner of the ship, or of the goods loaded thereon, or of the underwriters, he shall suffer death as a felon. *ibid.*

Fraud vitiates policies on lives, as well as those on marine insurances. *582*

It has the same effect on policies insuring against fire. *603*

Freight.

The freight or hire of ships, is a subject of insurance. *11*

In an insurance upon *freight*, the insured, if the ship be prevented by accident from sailing, cannot recover the value of the freight, which *he would have begun to earn if the ship had sailed.* *46*

But if the policy be a valued policy, and part of the cargo be on board when such accident happens, the rest being ready to be shipped, the insured may recover to the whole amount. *ibid.*

So in an *open* policy if the insured be under a charter-party for a specific freight. *47*

So a policy on homeward freight at-

taches while the ship is delivering her outward cargo, where the voyage out and home is under the same charter-party. *Page 48*

In these cases the criterion is, whether the voyage in which the ship is lost be a part of the voyage insured.

48, 49, 604

Where ship and freight are insured by two separate sets of underwriters, and by reason of an embargo in a foreign port, there is an abandonment to both, whether the underwriters on *ship* are entitled to *freight* earned in consequence of the embargo being taken off? *From p. 227 to p. 236*

The underwriter upon the *goods* is not liable for *freight* paid to the owner of the ship. *70*

Freight must contribute to a general average. *176, 177*

Furniture of Ship.

What is included under that. *73, 77*

Gaming Policies. See title *Wager Policies.*

General Average. See *Average.*

Globe Insurance Company.

Established by 39 G. 3. c. 83. P. 537.

How it shall plead. *572 n. 537*

Gold.

Whether insurable as goods. *25*

Goods.

Goods lashed on deck are not included under a general insurance on goods. *25*

Greeks.

SOME account of their commerce: they are supposed to have been unacquainted with insurance. *Introd. vii*

Hanseatic League.

AN account of its origin and decline. *Introd. xix*

Husband of a Ship.

The husband of a ship has no right to insure for any part owner, without his particular direction; nor for all the owners in general, without their joint direction. *Page 20*

Jettison or Jutson. See *Average.*

Jewels:

Whether insurable as goods. 25
Contribute to a general average. 175

Illegal Voyages.

WHENEVER an insurance is made on a voyage expressly prohibited by the common, statute, or maritime law of this country, the policy is void. *307*

It is immaterial whether the underwriter did or did not know that the voyage was illegal; for the court cannot substantiate a contract in direct contradiction to law. *311*

If a ship, though neutral, be insured on a voyage prohibited by an embargo, such an insurance is void. *ibid.*

An insurance upon a smuggling voyage prohibited by the revenue laws of this country would be void. *Aliter*, if merely against the revenue laws of a foreign state, with the knowledge of the underwriter. *263, 313, 314*

No country pays attention to the revenue laws of another. *ibid.*

The question, how far trading with an enemy, in time of actual war, is legal, considered and discussed from page *314 to 320*

The king may licence a trading with the enemy generally, or grant a qualified licence. *317*

The conditions on which a qualified licence is granted must be strictly complied with. *ibid.*

But courts of justice will permit every thing to be done, though not expressed, which is necessary to effectuate the intention of his Majesty in granting the licence. *ibid.*

The question how far insurances upon

the goods of an enemy are expedient, considered, from page *320 to 326.*

Whether they are expedient or not, such insurances are contrary to law. *320*

A policy on a foreign ship must be understood as virtually containing an exception of all captures made by the authority of the *British* government. *320*

A policy on a foreign ship containing an insurance against *British* capture, *eo nomine*, illegal and void upon the face of it. *ibid.*

Insurance on goods, the property of *Frenchmen*, shipped in *France* in time of peace, but exported after the commencement of hostilities, cannot be enforced against the underwriters upon the restoration of peace. *327*

Although a neutral be resident in a place occupied by the enemy, an insurance on goods, his property, to a neutral or friendly port, is valid. *327, 328*

No insurance can be made upon a voyage to a besieged fort or garrison, with a view of carrying assistance to them; or upon ammunition, warlike stores, or provisions. *328*

Insurance.

Insurance is a contract, by which the insurer undertakes, in consideration of a premium, equivalent to the hazard run, to indemnify the insured against certain perils and losses, or against a particular event. *Introd. ii.*
The utility of this contract. *Introd. ibid.*

The origin of it traced. *Introd. iii.*
The question, whether it was known to the ancients, considered.

Introd. ibid.
Insurances supposed to have arisen in *Italy.* *Introd. xxii.*

The *Italians* brought them into the various states of *Europe*, and into *England.* *Introd. xxiii, xxxvii*

Insurances are merely simple contracts. *1*
What kinds of property are the object of insurance. *11*

Bottomry and respondentia are a species of property which may be insured. *12*

But it must be specified in the policy to be such an interest, otherwise the policy is void. *Page 12*

Unless the usage of the trade takes it out of the general rule. *14*

But where the insurance is upon goods generally, the lien which a factor has upon the goods of his principal when a balance is due, is such an interest as will entitle him to recover upon such a policy. *1*

Insurances on the wages of seamen are prohibited. *14*

These prohibitions do not extend to the masters of ships. *ibid.*

A governor may insure the fort against the attack of an enemy, for his own benefit. *15*

Insurances on enemy's property contrary to law. *16, 17, 24c*

In an insurance on goods generally, goods lashed on deck, the captain's cloats, and ship's provisions are not included, unless specifically named. *25*

Insurance from A. to — is void *25*

Insurances for time are very frequent, as on a ship for twelve months. *79*

Insurances upon a voyage prohibited by the common, statute, or maritime law of the country, are void. *307*

See title *Illegal Voyages*.

Insurances on a voyage to a besieged fort or garrison, with a view of carrying assistance to them, or upon ammunition, warlike stores, or provision, are prohibited. *328*

All insurances on slaves are now prohibited. *32. note.*

Insurances upon prohibited goods.

See title *Prohibited Goods*.

Insurances void by stat. 19 Geo. 2. c. 37. See *Wager Policies*.

Insurances on Lives. See title *Lives*.

Insurances against Fire. See title *Fire*.

Insurers.

What persons may be insurers. *5*

Every individual may be an insurer or underwriter. *11*

But no society or partnership can underwrite, except the Royal Exchange

Assurance Company, and the London Assurance Company. *Page 11*

What shall be considered as a partnership within the statute of 6 Geo. 1. c. 18. *8, 9*

Insurers are liable for losses, which happen in the ship's boats, when landing the goods insured. *27*

Aliter, if in the boat of the owner of the goods. *ibid.*

Q. Are the insurers liable for thefts committed by the people on board the ship? *30*

Insured.

The name of the insured must be inserted in the policy; or the name of the agent who effects it as agent. *18, 19, 20*

This matter is now regulated and considerably altered by 28 Geo. 3. c. 56. *19, 20*

Q. Whether an action lies against the insured for premiums at the suit of the underwriter? *33, 6c8*

The broker, who effects the policy, may maintain such an action for premiums paid on his account. *33, 34*

Intention.

The intention of the parties, and not the literal meaning of the words, is to be attended to in the construction of policies. *40*

Interest or no Interest. See title *Wager Policies*.

Interest (Insurable).

A special interest in goods may be insured, such as the lien of a factor *13*
Money expended for the use of the ship by the captain is insurable, as goods, specie, and effects, especially if an usage has prevailed. *14*

Wages of seamen, and commodities in lieu of wages, not insurable; but the goods of the captain, or his share in the ship, may. *ibid.*

Insurance on commission and privileges of captain in *African* trade, legal. *15*

The governor of a factory abroad has an insurable interest in the safety of the place, *ibid.*

The

The owner of a ship having entered into a charter-party to go from the Thames to *Teneriffe*, and there to load a cargo of wines at a specific freight, has a good insurable interest in such freight; and if the policy be underwritten at and from London to *Teneriffe*, and from thence to the *West Indies*, he may recover, if the ship be lost in her way to *Teneriffe*. Page 47

The profits expected to arise on a cargo of molasses, belonging to the plaintiff, who had a contract with government to supply the army with spruce beer, are a good insurable interest. 354

2. Whether plaintiff's commissions as consignee of a cargo are an insurable interest? 355

Officers and crew of a ship, upon a joint capture by army and navy, have an insurable interest in the capture, before condemnation. 358

So of captors of ships in the voyage home for the purpose of bringing them to adjudication in the court of Admiralty. 359

So the Dutch commissioners have an insurable interest in the ships seized at sea to be brought into the ports of this kingdom. 360

[This case was affirmed in the Exchequer chamber.] 361

A creditor of a house abroad has an insurable interest on goods consigned to a third person for the purpose of paying his debt, though the creditor had not ordered the goods to be sent. 362

Various persons may insure various interests on the same thing, and each to the whole value. 375

Two partners purchased a ship under a regular bill of sale, conformable to Lord Hawkebury's act, (26 Geo. 3. c. 60.) and they afterwards took in two other partners, who paid their respective shares in the ship, but there was no transfer to them under the statute, and it was held that the four partners had not an insurable interest in the freight. 547, (note)

A merchant abroad, interested in goods, mortgaged them to his creditor here for payment of money at a certain day, the mortgagor has an insurable

interest, though the mortgage become absolute before the order for insurance arrives. Page 548

The indorser of a bill of lading has still an insurable interest, if it appear that the effect of the indorsement was only intended to bind the net proceeds, in case the goods arrived.

547, note (a)

A person holding a note given for money won at play, has not an insurable interest in the life of the maker of the note. 574

But a creditor has such an interest in the life of his debtor, that he may insure. 575

Executor of a creditor may maintain an action on a policy made by himself. *ibid.*

Lading (Bill of)

A BILL of lading is an acknowledgment under the hand of the captain, that he has received certain goods, which he undertakes to deliver to the person named in the bill of lading; it is assignable in its nature, and by indorsement the property vests in the assignee. 547, note (a)

Where several bills of lading of different imports have been signed, no reference is to be had to the time when they were first signed by the captain; but the person who first gets one of them by a legal title from the owner or shipper, has a right to the consignment. *ibid.*

Where bills of lading on the face of them are apparently different, and yet constructively the same, and the captain has acted *bonâ fide*, a delivery according to such legal title will discharge him from them all. *ibid.*

But if the intention of the parties appears to have been to bind the net proceeds only, in case of the arrival of the goods, an insurance made on account of the indorser is good. *ibid.*

Lien.

The broker has a lien upon the policies in his hands for his general balance.

543. note (b)

Lighters.

Lighters.

Loss of goods in ship's lighters falls upon the underwriters: *aliter*, if in the owner's lighters. *Page 27*

Lives (Insurances upon).

INSURANCE upon life is a contract by which the underwriter, for a certain sum, proportioned to the age, health, and profession of the person, whose life is the object of the insurance, engages that that person shall not die within the time limited in the policy; or if he do, that he will pay a sum of money to him, in whose favour the policy was granted. *571*

The advantages resulting from this species of contract stated. *ibid.*

It is impossible to ascertain its antiquity. *573*

No insurance shall be made on the life or lives of any person or persons; wherein the person, for whose use the policy is made, *shall have no interest, or by way of gaming or wagering*: but such insurance shall be null and void. *ibid.*

The holder of a note for money now at play has not an insurable interest in the life of the maker of the note. *574*

But a *bond fide* creditor has an insurable interest in the life of his debtor. *575*

But if after the death of the debtor his executors pay the debt, the creditor cannot afterwards recover upon the policy, although the debtor died insolvent, and the executors were furnished with the means of payment from another quarter than the estate of their testator. *576*

Declarations of the person whose life was insured as to his state of health when the insurance was effected, going to shew a fraud committed on the insurer, are recoverable in evidence in an action on the policy. *578*

In a life insurance, the insurer undertakes to answer for all those accidents, to which the life of man is exposed, except suicide, or the hands of justice. *ibid.*

The death must happen within the time limited in the policy; otherwise the insurers are discharged. *ibid.*

If a man receive a mortal wound during the existence of the policy, but does not in fact die till after, the insurers are not liable. *Page 578*

But if a man whose life is insured, goes to sea, and the ship in which he sailed is never heard of afterwards, the question whether he did or did not die within the term insured, is a fact for the jury to ascertain from the circumstances. *579*

This sort of policy being on the life or death of man, does not admit of the distinction between total and partial losses. *ibid.*

In a life insurance it has been held, that if the insurer become bankrupt before the loss happens, the person interested might prove the debt under the commission, as if the loss had happened before it issued. *580*

A policy was made for one year from the day of the date thereof; the policy was dated 3d Sept. 1697. The person died on the 3d Sept. 1698, about one o'clock in the morning; and the insurer was held liable. *581*

It is now usual to insert in the policy "the first and last days included."

582
Fraud equally vitiates policies on lives, as in the case of marine insurances.

ibid.
Where there is a warranty that the person is in good health, it is sufficient that he be in a reasonable good state of health, for it never can mean that he is free from the seeds of disorder. *583*

If the person whose life was insured, laboured under a particular infirmity; if it be proved by medical men, that in their judgment it did not at all contribute to his death, the warranty of health has been fully complied with, and the insurer is liable. *ibid.*

If the person, whose life was insured, should commit suicide, or be put to death by the hands of justice, the next day after the risk commenced, there would be no return of premium. *585. 586*

London.

What shall be deemed the port of
London. 441, 442

London Assurance Company.

Erected by royal charter, authorized
by stat. 6 Geo. 1. ch. 18. 6, 7, 8
This, and the Royal Exchange Assu-
rance Company, are the only societies
which may insure. 7
The privileges of the *South Sea* and *East*
India Companies preserved. 10
This company has a common seal. 6
It rejects the words "*or the ship be*
stranded," in the memorandum at
the foot of the policy. 24
This company, when sued in an action
of debt, may plead generally, that
they owe nothing, and give the special
matter in evidence. 535, 536
So when sued in *covenant*, they may
plead generally, "*that they have not*
broken the covenant." *ibid.*
The company obtained his majesty's
charter to enable them to make insu-
rances upon lives. 572

Loss.

The loss must be a *direct and immediate*
consequence of the peril insured, and
not a remote one, in order to entitle
the insured to recover. 77
It is not a loss within the policy, that
the port of destination has been shut
by order of the enemy against the
ships of the nation to which the ship
insured belongs. 223, 240

Loss by Perils of the Sea, vide Perils of
the Sea.

Loss by Capture, vide Capture.

Loss by Detention, vide Detention.

Loss by Barratry, vide Barratry.

Of an Average or Partial Loss, vide
Partial Losses.

Lost or not Lost.

These words peculiar to *English* policies.
Page 32

Malt

Is included under the word *corn* in the
memorandum. 149

Market.

THE rise or fall of the market is a
charge which never falls upon the
insurer. 132, 139, 144

Master of Ships.

The name of the *master* must be inserted
in the policy. 20
Neither the master's cloaths, nor goods
lashed on deck, are included under a
general insurance *on goods*. 25
Whatever is done by the master of the
ship in the usual course of the voyage,
necessarily *et ex justa causa*, though a
loss happen thereon, the underwriter
shall be answerable. 40
A *mistake* of the master cannot be called
a *peril of the sea*. 83
Of barratry of the master, see *Bar-*
ratry.
The wearing apparel of the master is
excepted from the allowance of sal-
vage. 188

Memorandum.

The memorandum at the foot of the
policy exempts the underwriters from
partial losses not amounting to 3 *per*
cent. unless it arise from a general
average. 24, 135
It also provides, that the underwriters
will not answer for any partial loss on
corn, fish, salt, fruit, flour or seed,
unless occasioned by a general average
or the stranding of the ship; nor are
they liable for any partial loss on su-
gar, tobacco, hemp, flax, hides, and
skins, under 5 *per cent.* 24
If three chests of goods out of 101 be
wholly

wholly spoiled, will the underwriter be liable? *Page* 136

Corn is a general expression, and has been held to include *peas* and *beans* and *malt*. *149*

The word *Salt* has been held not to include *Salt-petre*. *ibid.*

It has been held that the underwriters are not answerable, within that part of the memorandum which exempts them from all partial losses to corn, fish, salt, fruit, or seed, as long as the commodity specifically remains, although wholly unfit for use. *ibid.*

This was held with regard to a cargo of *wheat*, partially damaged by a storm. *ibid.*

A cargo of fish arrived, but was stinking, and wholly unfit for use, the insurer was held not to be liable. *151*

So of a cargo of fruit. *155*

A cargo of *peas* arrived at the port of destination; but they were so much damaged, that the produce was three-fourths less than the freight; the insurer was held to be discharged. *160*

The effect of the memorandum discussed. *156*

Misdemeanor.

Any person, except those mentioned in the Stat. 12 *Anne*, Stat. 2. ch. 18. entering a ship in distress, without leave of the superior officer, or of the officer of the customs, or molesting or hindering them in the preservation of the ship, or defacing the marks of the goods on board, shall make double satisfaction, or be sent to the house of correction for 12 months. *183*

If goods stolen from such ship shall be found on any person, they shall be delivered to the true owner, or such person shall pay treble the value. *ibid.*

Missing Ship.

A ship that has been missing for considerable time, shall be considered as having foundered at sea. *85*

In practice, this time has been generally fixed to six months after the ship's departure for any part of *Europe*, or

twelve months, if for a greater distance. *Page* 86

Mistake.

2. Whether insurers liable for those of the captain? *83*

Misrepresentation, vide title *Fraud*, &c.

Money.

Whether insurable as goods. *25*
Contributes to general average. *177*

Mooring.

What shall be deemed mooring in good safety. *45*

Name.

THE name of the insured must be inserted in the policy; or the name of the agent affecting it, *as agent*. *18, 19, 20*

It is now sufficient to insert the name of the person actually interested, or that of the consignee or consignee of the goods, or the names of those who receive the orders to insure, or who shall give the orders to effect the insurance. *19, 20*

The name of the ship and master must be inserted in the policy. *20*

But the insurance is not vitiated if the name of the ship be mistaken. *21*

The ship may be changed in the voyage if necessity require it. *23*

Navigation.

Insurances which tend to a breach of the navigation acts are void. *335 to 339*

Negligence.

Action lies against an agent who neglects to insure. See titles *Agents* and *Agents*. *404*
New.

Neutrality.

A neutral ship is not obliged to stop to be searched; the searcher does it at his peril, it is a case of improper detention, for the costs of which the insurer is liable. *Page* 104, 498
This point is now decided otherwise, and a ship must stop to be searched.

500, 501
It is not a breach of neutrality for a neutral ship to carry enemy's property from her own to the enemy's country, though she be thereby liable to be detained and carried into a *British* port for the purpose of search. 328

If a man warrant the property to be neutral, and it is not, the policy is void *ab initio*. 460

In an insurance upon goods, the insured warranted the ship and goods to be neutral, it was expressly found by the jury that they were not neutral. The court, therefore, though the loss happened by storm, and not by capture, declared that the contract was void. *ibid.*

If the ship and property are neutral when the risk commences, this is a sufficient compliance with a warranty of neutrality. 460, 462

The insurer takes upon himself the risk of war and peace. 461

If the property be neutral at the time of sailing, and a war break out the next day, the insurer is liable. 462

For the effect of the sentence of a foreign court of Admiralty upon the question of neutrality, see ADMIRALTY.

Notice,

Of abandonment when to be given. 239

Oleron (Laws of).

AN account of them. *Introd.* xxvi
They do not treat of insurances. *Introd.* xxviii

Open Policy.

In an *open* policy, the value of the property is not mentioned; but must be proved at trial. *Page* 1, 137

Opinion, see Evidence.

Owner.

A ship's husband has no right to insure for the rest of the owners, without their direction. 20

Partial Losses.

AVERAGE loss, in policies of insurance, means a particular partial loss. 133

It is less ambiguous to call it a *partial* than an *average* loss. *ibid.*

Partial loss, when applied to the ship, means a damage, which she may have sustained in the course of the voyage, from some of the perils mentioned in the policy: when to the cargo, it means the damage which the goods have suffered from storm, &c. though the whole or the greater part thereof may arrive in port. 135

These losses fall upon the underwriter, if they amount to 3*l.* *per cent.*

135, 149
But if a loss, arising from a *general average*, should be under 3*l.* *per cent.* still the underwriter is liable. 135

Suppose 101 chests of goods be shipped, and three of them be wholly spoiled: 2. Will the underwriter be liable?

136
How average settled where several articles are insured for one sum, with a distinct valuation on each, and the policy does not attach upon all.

ibid.
In case of a partial loss, the value of the policy can be no guide to ascertain the damage, but it becomes the subject of proof as in case of an open policy. 137

When goods are partially damaged the underwriter must pay the owner such pro-

proportion of the prime cost or value in the policy, as corresponds with the proportion or diminution in value occasioned by the damage. *Page 137*
 The proportion is ascertained in this way; where an entire thing, as one hogshhead of sugar, happens to be spoiled, if you can fix whether it be a third or fourth worse, then the damage is ascertained. 138, 142
 This can only be done at the port of delivery where the whole damage is known and the voyage is completed.

138
 Whether the price of the commodity be high or low, it equally ascertains the proportion of damage. This proportion the underwriter must pay, not of the value for which it sold, or the market price of the commodity; but of the value stated in the policy.

ibid.
 When it is an open policy, the invoice of the original cost, with the addition of all charges, and the premium of insurance, shall be the ground of the computation. *ibid.*

But whether the goods arrive at a good or bad market, it is immaterial to the insurer. *ibid.*

The true way of estimating the loss is to take the value of the commodity at the fair invoice price. *ibid.*

These rules can only apply to cases where there is a specific description of goods. 146

Where the property is of various kinds, an account must be taken of the value of the whole, and a proportion of that as the amount of the goods lost. *ibid.*

In adjusting a partial loss on goods arising from sea damage, the calculation is to be made on the difference between the respective *gross proceeds* of the same goods when found and when damaged, and not on the *net proceeds*. *ibid.*

In case of total loss the valuation in the policy is adhered to, unless there be some proof of fraud. 147, 148

This rule abided by in insurance on ship where value greatly diminished at

time of loss, by consumption of stores, &c. *Page 148*

2. Whether goods partially damaged may be opened, except in the presence of the insurers or their agents. 148
 No loss shall be deemed total so as to charge the insurers within the meaning of that part of the memorandum which exempts them from partial losses happening to corn, fish, salt, fruit, flour, and seed, so long as the commodity specifically remains, though perhaps wholly unfit for use.

149
 This was held with respect to a cargo of wheat, which was partially damaged in a storm. *ibid.*

The same with respect to a cargo of fish, which was stinking, and of no value when examined. 151

But when a cargo of fruit was so much putrid from sea damage that it was obliged to be thrown overboard, the underwriters held liable. 153

A cargo of *peas* was so much damaged, that the produce was three-fourths less than the *freight*: but as it in fact arrived at the port of destination, the underwriter was held not to be liable. 160

In policies upon lives, there cannot, from the nature of the event, be a partial loss. 579

But there may in insurances against fire. 595

Of adjusting a partial Loss. See Adjustment.

Partnership.

No society or partnership can underwrite, except the Royal Exchange and the London Assurance Companies. 7

What shall be a partnership within the statute 5 Geo. 1. ch. 18. 8, 9, 10

Payment of Money into Court.

The underwriters were empowered by statute to pay money into court upon any dispute; and then the insured proceed at their peril. 144

Perpet.

People.

People, in the clause of a policy respecting detention, means the governing power of the country. Page 103

Perils of the Sea.

Every accident, happening by the violence of wind or waves, by thunder and lightning, by driving against rocks, or by the stranding of the ship, may be considered as a peril of the sea. 82

For such losses the underwriter is answerable. *ibid.*

A ship driven by the wind on an enemy's coast, and there captured, having sustained no damage from the wind, shall be said to be lost by capture. *ibid.*

Two of the men employed in mooring a ship in a harbour were impressed, whereby she went ashore and was lost. This held a loss by perils of the sea. 81. n

The mistake of the captain not a peril of the sea. 83

A loss of slaves by death from failure of provisions, occasioned by delay from stormy weather, is not a loss by perils of the sea. 84

Destruction of a ship by worms infesting the rivers of *Africa*, is not a peril of the sea. 85

A ship which is never heard of, after her departure, shall be presumed to have perished at sea. *ibid.*

This was held in an action on a policy upon the ship from *North Carolina* to *London*; and the loss was stated to be by sinking at sea; the evidence to support this averment was, that after sailing from port she had never been heard of. 85

The same was held in a case, where ship had been captured and ransomed at sea, but was never afterward heard of, and never arrived at her port of destination. *ibid.*

In *England* no time is fixed, within which payment of a loss may be demanded from the underwriter, in case the ship is not heard of. 86

A practice, however, prevails among merchants, that a ship shall be deemed lost, if not heard of within six months after her departure for any part of *Europe*, or within twelve, if for a greater distance. Page 86

Petty Average

Consists of such charges as the master is obliged to pay, by custom, for the benefit of the ship and cargo; such as pilotage, beaconage, &c. 133 These never fall upon the underwriter. 184

Another sense, in which this word is understood, is when we speak of a small duty, which merchants, who send goods in the ships of other men, pay to the master, over and above the freight, for his care and attention. *ibid.*

This is a charge which never falls upon the underwriter. *ibid.*

Pilot. Vide Sea-worthiness.

Pirates.

The underwriter, by express words in the policy, undertakes to indemnify against the attacks of pirates. 83

Plea. See Declaration.

Policy.

A policy is the instrument by which the insurance is effected. 1

Policies are of two kinds; *valued* and *open* policies: the difference between them. *ibid.*

They are only simple contracts; but of great credit. *ibid.*

Cannot be altered when once they are signed. *ibid.*

Unless there be some written document to shew that the meaning of the parties was mistaken: or unless they be altered by consent. 2, 3

A policy is a species of property for which trover will lie at the instance of the insured, if it be wrongfully withheld from him. 4

- The written clauses in a policy will control the printed words. *P. 4, 5*
 The form of the policy now used is two hundred years old. 17
 Very irregular and confused, and often ambiguous. *ibid.*
 There are nine requisites of a policy. 17, 18
 The name of the person insured. 18
 This is regulated by stat. 25 Geo. 3. c. 44. and 28 Geo. 3. c. 56. 18, 19, 20
 Upon the former act it has been held, that if an agent effects a policy for the principal residing abroad, his name must be inserted in the policy as agent. 19
 Q. When the principal resides abroad, must not the agent live in England? *ibid.*
 The names of the ship and master; unless the insurance be general, "on any ship or ships." 20
 Whether the insurance be made on ships, goods or merchandizes. 23
 As to the memorandum at the foot of the policy, see *Memorandum*.
 A policy on goods generally does not include goods lashed on deck, the captain's cloaths, or the ship's provisions. 25
 A policy must contain the name of the place at which the goods are laden, and to which they are bound. 26
 A policy from *L.* to — is void. *ibid.*
 When the risk commences, and when it ends. On the goods it usually begins from the loading, and continues till they are safely landed: on the ship, from her beginning to load at *A.* and continues till she arrive at the port of destination, and be there moored 24 hours. 27
 The various perils against which the underwriter insures. 30
 Q. Whether the underwriter is liable for thefts committed by the people on board; and for loss arising from bad stowage, &c. 31
 The policy is frequently made with the words, *lost or not lost*, in it: which add greatly to the risk. 32
 The policy must contain the premium or consideration for the risk. 33
 The day, month, and year, on which the policy was executed, must be inserted. *Page 35*
 The policy must be duly stamped. *ibid.*
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 In what cases policy may be altered. 38, 39
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 It is in the policy acknowledged by the insurer to be received at the time of underwriting. *ibid.*
 Q. Whether after this the insurer could maintain an action against the insured himself for the premiums. *ibid.*
 In practice, the insured generally acts by a broker, and by the custom, an action may be maintained against him, notwithstanding the acknowledgement in the policy. *ibid.*
 The broker may also maintain an action against the assured for premiums paid on his account. 34
 And the underwriter may maintain an action directly against the broker for premiums. 35
 The receipt for the premium contained in the policy, is conclusive evidence as between the assured and the underwriter. 608, 609
 See

See Fraud.

When the Premium shall be returned, see title Return of Premium.

Profits.—See Interest (Insurable).

Prohibited Goods.

All insurances upon commodities, the importation or exportation of which is prohibited by law, are void.

Page 329

This rule prevails, whether the insurer did or did not know that the subject of the insurance was a prohibited commodity. *ibid.*

The parliament of England has passed a law, inflicting a penalty of 500*l.* on the insurer, who should, by way of insurance, procure the importation of prohibited goods; and a like penalty on the insured. 330

By a subsequent law, the importation of any foreign alamoses or fustrings, by way of insurance or otherwise, without paying the duties, is expressly prohibited. 331

Whoever, by way of insurance, undertakes to export wool from England to parts beyond the seas, shall be liable to pay 500*l.* 332

The like penalty is inflicted on the insured. 333

Besides which all insurances on woollen goods are declared void. *ibid.*

Persons making such insurances on wool, &c. are liable for the first offence to a fine of 50*l.* and six months' solitary imprisonment. The same penalty on the insured; and the insurance is void. *ibid.*

Insurances made to protect smuggled goods are void. 335

Insurances, which tend to a breach of the navigation acts, are void. 335 to

339

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shipped from the British West Indies for Gibraltar. Page 337 note

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Protest shewn by plaintiff to defendant not evidence for the defendant. 547, 548

Provisions of a Ship

Are not included under a general insurance on goods. 25

But provisions sent out in a ship for the use of the crew are protected by a policy on the ship and furniture. 74

Provisions expended during a detention to repair, or detention by an embargo, cannot be recovered against the insurer on the ship or goods. 70, 72

Whether they fall into a general average? 174

Ship's provisions do not contribute to a general average. 176

Ransoms

Are prohibited by statute; and money paid for ransoming a ship cannot be recovered from the underwriters. 91, 219

Re-assurance.

RE-ASSURANCE is a contract which the first underwriter enters into, in order to relieve himself from those

those risks which he has previously undertaken by throwing them upon other underwriters, who are called Re-assurers. *Page 369*

This species of contract is countenanced in most parts of *Europe*. *ibid*

The opinions of foreign writers upon re-assurance stated. *ibid.*

They were admitted in *England* till the 19 *Geo. 2. c. 37. s. 4.* which declares it to be unlawful to make re-assurance, unless the assurer should be insolvent, become a bankrupt, or die: in either of which cases, such assurer, executors, administrators, or assigns, might make re-assurance to the amount before by him assured, expressing in the policy that it is a re-assurance. *370*

The reasons for these exceptions as to bankrupts and deceased underwriters, stated *371*

Re-assurances on *foreign* ships are prohibited by this act, except in the three instances mentioned in the statute. *372*

In *France*, and other countries, it is allowed to the insured to insure the solvency of the underwriter. *373*

Not allowed in *England*. *ibid.*

Distinction between a re-assurance and a double insurance. *ibid.*

Where a policy void as a re-assurance, the premium is not recoverable. *513*

Recapture. See Capture.

Registration.

The law of *England* does not require that a policy should be registered. *39*

Rendezvous.

Sailing from place of rendezvous is a departure with convoy. *44*

Representation. See title Fraud, and titles Warranty.—Convoy.

Requisites of a Policy.

The name of the person insured. *18*

The name of the ship and master. *P. 20*
Whether they are ships, goods, or merchandizes, on which the insurance is made. *23*

The name of the place at which the goods are laden, and to which they are bound. *26*

The time when the risk commences, and when it ends. *27*

The various perils to which the underwriters are exposed. *30*

The consideration or premium for the hazard run. *33*

The time when the policy was executed. *35*

That the policy be duly stamped. *ibid.*

Respondentia. See Bottomry.

Return of Premium.

The question, whether the premium is to be returned by the underwriter, where the insured has been guilty of fraud, considered. *283*

The ordinances of foreign states declare, for the most part, that it shall. *ibid.*

In *England* there has been no legislative regulation; and the courts of justice had not till lately adopted any general rule upon the subject. *ibid.*

In two or three instances where the underwriters have been relieved in Chancery, from the payment of the sums insured on account of fraud, the decree has directed the premium to be returned. *284*

The question came on to be considered in the King's Bench; but the trial being had under a decree of the court of Chancery, and the insurer having there made an offer of returning the premium, the Court of King's Bench considered this offer in the same light as if he had paid the money into court; and therefore the question remained undecided. *ibid.*

But in case where the fraud was of a very gross and heinous nature, Lord Mansfield told the jury, that the premium

premium should not be restored to the insured. *Page 285*
 In all cases of *actual* fraud on the part of the assured or his agent, the underwriter may retain the premium. 286
 It is clear, that if the underwriter has been guilty of fraud, an action lies against him, at the suit of the insured, to recover the premium. *ibid.*
 In cases of deviation the premium is not to be returned. 421
 Where property has been insured to a larger amount than the real value, the insurer shall return the overplus premium. 503
 If goods are insured to come in certain ships from abroad, but are not in fact shipped, the premium shall be returned. *ibid.*
 If the ship be arrived before the policy is made, the insurer being apprized of it, and the insured being ignorant of it, he is entitled to have his premium restored. *ibid.*
 But if both parties are ignorant of the arrival, and the policy be *lost* or *not lost*, it should seem the underwriter ought to retain it. *ibid.*
 Clauses are frequently inserted by the parties, that upon the happening of a certain event there shall be a return of premium. *ibid.*
 If the ship or property insured was never brought within the terms of the contract, so that the insurer never ran any risk, the premium must be returned. *ibid.*
 A clause was inserted that *8l. per cent.* of the premium should be returned, if the ship sailed from any of the *West India* islands with convoy for the voyage and arrives. The court held, that the arrival of the ship, whether with or without convoy, entitled the party to a return of the premium stipulated. 505
 So also, though there has been a capture and re-capture during the voyage insured. 507
 Whether the cause of the risk not being run is attributable to the *fault*, *will*, or *pleasure* of the insured, the premium is to be returned. 503, 509

When the words *and arrive* follow other conditions in a clause for a return of premium, these words annex a condition which overrides all the others. *Page 508 note*
 When a policy is void as a *wager* policy, the court will not allow the insured to recover back the premium. 510
 Nor in the case of a *re-assurance*. 513
 Where a policy was made to cover a trading with the enemy the insurance is void, and the assured cannot recover the premium. 514
 So where the insurance is contrary to the navigation laws. 515
 Where the risk has *once* commenced, there shall be no apportionment or return of premium afterwards. *ibid.*
 Therefore no return in deviations. *ibid.* note (a)
 But if there are two distinct points of time, or, in effect, two voyages either in the contemplation of the parties, or by the usage of trade, and only one of the two voyages was made, the premium shall be returned on the other, though both are contained in one policy. 516
 Thus held in an insurance "at and from *London* to *Halifax*, warranted to depart with convoy from *Portsmouth*," when the ship arrived at *Portsmouth* the convoy was gone. The premium for the voyage from *Portsmouth* to *Halifax* was returned. 378
 A ship was insured for twelve months, at *9l. per cent.* warranted free from *American* captures. The ship was taken within two months by the *Americans*; but there shall be no return of premium, because the contract was entire; the premium was a gross sum stipulated and paid for twelve months. 516
 So also it was held where a ship, insured for twelve months, was taken at the end of two; though the whole premium of *18l.* was acknowledged to be received at the rate of *15s. per month*; for that is only a mode of computing the gross sum. 519
 When the contract is entire, whether it be for a specified time, or for a

- voyage, there shall be no apportionment or return, if the risk has once commenced. Page 524, 525
- Where the premium is entire in a policy on the voyage, where there is no contingency at any period, out or home, upon the happening or not happening of which the risk is to end, nor any usage established upon such voyage; though there be several distinct ports, at which the ship is to stop, yet the voyage is one, and no part of the premium shall be recoverable. 525
- It is otherwise, if the jury find an express usage upon the subject of return of premium. 529
- Indeed, it seems that there never has been an apportionment, unless there be something like an usage found to direct the judgment of the court. 530
- If a person whose life is insured, should commit suicide, or be publicly executed the next day after the risk commences, there can be no return of premium. 586
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- Rhodians.*
- Some account of their maritime regulations. Introd. iv
- Supposed to have been unacquainted with the contract of insurance. Introd. vi
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- Risk.*
- The risk on the ship in general commences from her beginning to load, and continues till she has moored twenty-four hours in safety. On goods from the loading till they are safely landed, which includes the carriage to the shore in the ship's boats, or in public lighters, but not in those of the owner of the goods. 27, 28, 29
- The risks which the underwriters take upon themselves. 30
2. Whether theft by the people on board be of the number? Page 30
- Insurers not liable to all the usual risks on cargoes of slaves. 32
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- Royal Exchange Assurance Company.*
- Erected by royal charter, authorised by stat. 6 Geo. 1. ch. 18. 7
- This and the London Assurance Company, are the only societies which may make insurances. 7, 8
- The privileges of the South Sea and East India Companies preserved. 10
- This company rejects the words "*or the ship be stranded*," in the memorandum at the foot of the policy. 24
- This society, when sued in an action of debt, may plead generally that they owe nothing, or in covenant that they have not broke it, and in both cases may give the special matter in evidence. 536
- This company obtained his majesty's charter to enable them to make insurances on lives. 572
- Sailing (Warranty of).*
- If a man warrant to sail on a particular day, and do not, the insurer is discharged. 429
- This rule holds, though the ship be delayed for the best and wisest reasons, or even though she be detained by force. *ibid.*
- Thus, where a ship was insured "at and from Jamaica," warranted to sail on or before the 26th of July, it appeared that the ship was ready and would have sailed on the 25th, if she had not been restrained by the order and command of Sir Basil Keith, governor of

of Jamaica, and detained beyond the day. The insurer was discharged.

Page 429

This rule is adopted by foreign writers.

430

If the warranty be to sail *after* a specific day, and the ship sail before, the policy is equally avoided as in the former case. *ibid.*

Upon a warranty to sail on or before a particular day, if the ship sail before the day from her port of loading *with all her cargo and clearances on board*, to the usual place of rendezvous at another part of the island merely for the sake of joining convoy, it is a compliance with the warranty, though she be afterwards detained there by an embargo beyond the day.

431

But if her cargo was not complete it would not be a commencement of the voyage. *ibid.*

The same doctrines prevail, even though a condition be inserted in one of the ship's clearances, *that she should pass by the place* (at which she was detained by the governor beyond the day named in the warranty) to take the orders of government.

436

Thus also where an embargo was actually published before the ship sailed, and the captain, immediately after crossing the bar, returned to make a protest, and knowingly sent his ship into the embargo; yet, as he swore that he believed the embargo was to be taken off, the underwriter was held liable.

440

What shall be a sailing from the port of London. 2.

441

Sailing Instructions.

Essential to convoy.

443 & seq.

Sailors.

Insurances on the wages of sailors are forbidden.

14

Slaves, or any commodity to be received in lieu of wages by a sailor, cannot be insured.

15

But the captain may insure goods which

he has on board, or his share in the ship if he be part owner. Page 15

The wearing apparel of the sailors is excepted from the allowance of salvage.

188

Salt.

The word *Salt* used in the memorandum of a policy of insurance has been held not to include *Salt-petres*.

149

Salvage.

Salvage is an allowance made for saving a ship or goods, or both, from the dangers of the seas, fire, pirates or enemies; it is also used sometimes to signify the thing itself which is saved. But the former is the sense in which it is here used.

180

In an action of trover, it has been held that the defendants might retain the goods till payment of salvage, as well as a taylor the cloaths which he has made. *ibid.*

180

When a ship has been wrecked, the law of England by various statutes declares, that *reasonable* salvage only shall be allowed to those who save the ship or any of the goods; and what shall be a reasonable allowance must be ascertained by three justices of the peace.

181 to 187

The clause of 12 Ann. stat. 2. c. 18. referring the *quantum* of compensation to three justices of the peace only applies to cases where application is made by or on behalf of the commander of any vessel in distress to certain public officers, and where the salvage is made through them and others employed by them.

183, note (a)

But now by 48 Geo. 3. c. 130. it is provided, that in all cases the *quantum* of compensation shall be referred to three justices of the peace.

615

If any prize taken from the enemy shall appear to have belonged to any of his majesty's subjects, it shall be restored to the former owner, upon his paying in lieu of salvage, one-eighth of the value if retaken by one of his ma-

3 A 4

jefty's

jesty's ships, but if retaken by a privateer, one-sixth. Page 94, 188
 Wearing apparel of the master and seamen are always excepted from the allowance of salvage. 188
 The valuation of a ship and cargo, in order to ascertain the rate of salvage, may be determined by the policies of insurance made on them respectively; if there be no reason to suspect they are undervalued. If there be no policy, the real value must be proved by invoices, &c. 188, 189
 Underwriters by their policy, expressly undertake to bear all expences of salvage. 189
 In order to entitle the insured to recover expences of salvage, it is not necessary to state them in the declaration, as a special breach of the policy. *ibid.*
 Thus in a declaration on a policy on goods, it stated, that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled. Lord *Hardwick* held that under this declaration, the plaintiffs might give in evidence the expences of salvage. *ibid.*
 But if the insurer pay to the insured such expences, and from particular circumstances, the loss be repaired by unexpected means, the insurer shall stand in the place of the insured, and receive the sum thus paid to atone for the loss. 190, 212
 Where the salvage is high, the other expences are great, and the object of the voyage is defeated, the insured is allowed to abandon to the insurer, and call upon him to contribute for a total loss. 191

See Abandonment.

There is neither average nor salvage upon a bottomry bond in *England*.

Aliter, in *France* and *Denmark*. 564
565

Sea, vide Perils of the Sea.

Sea-worthiness.

Every ship insured must, at the commencement of the insurance, be able

to perform the voyage, unless some external accident should happen, and if she have a latent defect wholly unknown to the parties, that will vacate the contract, and the insurers are discharged. Page 288
 Ship insured *at and from*, the policy is not void because the ship is under repair at the place to make her fit to go to sea. 299, note (4)
 This arises from a tacit and implied warranty, that the ship shall be in a condition to perform the voyage. 288
 But the insured ought to know whether she was sea-worthy or not at the time she set out upon her voyage; yet if it can be shewn that the decay to which the loss is attributable, did not commence till a period subsequent to the insurance, the underwriter will be liable if she should be lost a few days after her departure. 289
 If a ship become leaky immediately after sailing, and founders without any visible cause, the jury may presume she was not sea-worthy. 289, note (a)
 The whole doctrine of sea-worthiness to be collected from the case of the *Mills* sloop, which is fully stated from page 290 to 296, and see also 297, 298
 Where there is an insurance upon a ship *at and from*, it is sufficient if she be sea-worthy at the time of sailing. 299, note (a)
 The doctrine of sea-worthiness, as established by the law of *England*, is consonant to the laws of all commercial and maritime states in *Europe*. 300
 Where the ship is not sea-worthy, the policy is void, as well where the insurance is upon the goods, as when it is upon the ship itself. 306
 But insufficiency in a former voyage will not vacate the contract. 300
 The ship must be properly equipped, have a sufficient crew, a captain and pilot of competent skill. 301
 Must be so equipped as to be rendered as secure as possible from capture as well as from the perils of the sea. 304

Sentence.

Sentence.

See the effect of the sentence of foreign courts considered. Page 462, 463 note (a).

See Admiralty.

Ship.

The name of the ship must be inserted in the policy 20
But if necessity require it, the ship may be changed in the course of the voyage, and the insurer on the cargo continues liable. 23, 383
Sometimes there are insurances on an ship or ships. 21
Such insurances are legal, and how applied. 22

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Underwriter not bound by his name being put down upon a ship. 37 note
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Smuggling on his own account is an act of barratry in the master. 42
An insurance upon a smuggling voyage, prohibited by the revenue laws of this country, is void: *aliter*, if merely against the revenue laws of a foreign state. 313

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Every policy of insurance must be duly stamped. 35
In what cases alterations in policy permitted by stamp act. 38, 39
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For bad stowage of the cargo the insurer is not answerable. 30

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What shall be deemed a stranding with in the memorandum, by which so average loss on fruit, &c. is recoverable, unless the ship be stranded.

Page 24, 150.

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2. **W**HETHER the insurers are answerable for thefts committed by the people on board the ship? 30

They are expressly liable for thefts committed by external thieves. 31

Time.

No policy for time must be for a longer term than 12 months. 37

In insurances upon time, the court, in their construction of them, has always attended to the meaning of the parties, and a liberal exposition of the words of the contract. 79

A policy was made on a letter of marque at and from *Liverpool* to *Antigua*, with liberty to cruise six weeks; the court held that this meant six successive weeks, and not a desultory cruising for six weeks at any time. 79, 80

Total Loss.

A total loss in insurances does not always mean that the property insured is irrecoverably lost or gone; but that, by some of the perils mentioned in the policy, it is in such a condition as to be of little use or value to the insured, and to justify him in abandoning his right to the insurer, and calling upon him to pay the whole of his insurance. 132, 193

In a total loss, properly so called, the prime cost of the property insured, or the value in the policy, must be paid by the underwriter. 134

Where the policy is a valued one, it is only necessary to prove that the goods were on board at the time of the loss. *Page 137*

Where it is an open policy, the value must also be proved. *ibid.*

The insured may call upon the underwriter for a total loss, if the voyage be absolutely lost, or not worth pursuing: if the salvage amount to half the value; or if further expence be necessary, and the underwriter will not engage at all events to bear that expence. *194, 201, 202*

The right to abandon must depend on the nature of the case at the time of the action brought, or at the time of the offer to abandon; and therefore if at the time advice is received of the loss, it appear that the peril is over and the thing is in safety, the insured has no right to abandon. *195, 207*

Thus, in a case where there was a capture and recapture, and it was stated that, at the time of the offer to abandon, the ship was safe in port, and had sustained no damage, the court held that the insured had no right to abandon. *205*

But if the underwriter pay for a total loss, and it afterwards turn out to be but partial, the insured shall not be obliged to refund; but the insurer shall stand in his place for the benefit of salvage. *212*

Where neither the thing insured nor the voyage is lost, the insured cannot abandon. *217, 219*

A vessel insured for six months is captured and sold by the captors, and purchased by the captain for the original owners, this is only a partial loss; though otherwise if the assured had abandoned, when carried into port in the enemy's possession. *219*

Trover.

Trover will lie for a policy, at the suit of the insured, if it be wrongfully withheld from him. *4*

In trover, a defendant may in evidence justify the retainer of the goods till payment of salvage. *180*

Underwriter. See insurer.

Usage.

IN the construction of policies no rule has been more frequently followed than the usage of trade with respect to the voyage insured. *Page 40*

As to usage upon a warranty of convoy. *44*

Upon an insurance on goods to *Labrador*, and till they were safely landed, the insurers were held liable, on account of the usage, although the loss did not happen till a month after the ship's arrival, the crew having been all that time employed in fishing, and never having unloaded the goods but at leisure times. *58*

Goods, while on board launches, protected by a policy from N. to C. till discharged and safely landed, such being the usual method of carrying on that trade. *29. note.*

Effect of usage in *Newfoundland* trade. *605, 606*

As to the Usage in *East India Voyages*, see title *East India Voyages*.

Valuation.

IN a total loss, the underwriter must pay the amount of the prime cost of the property insured, or the value mentioned in the policy. *132*

So if part of the cargo, capable of a distinct valuation, be totally lost, the insurer must pay the whole prime cost of the part so lost. *ibid.*

In case of a partial loss, when the policy is valued, the rule for estimating the damage, is to ascertain whether the goods be a third or fourth worse when they arrived at the port of delivery; and then the underwriter must pay a third or fourth of the value in the policy, without regard to the rise or fall of the market. *138, 142*

When the valuation is not stated in the policy, the invoice of the cost, with addition of all charges, and the premium of insurance, is the foundation upon which the loss shall be computed. *138*

Valued

Valued Policy.

In *valued* policies, the value of the property insured is inserted at the time of making the contract, and upon a trial, it is not necessary to go into the proof of the value, because it is admitted by the policy. *Page 1, 137*
It is in such a case only necessary to prove that the property was on board.

Where the loss is partial, the value in the policy can be no guide to ascertain the damage; and it must become a subject of proof, as in the case of an open policy. *ibid.*

A valued policy is not a wager policy

In a valued policy, it is only necessary to prove some interest to take it out of the statute 19 *Geo. 2. c. 37.*

If used merely as a cover to a wager, such an evasion would not be allowed to defeat the statute.

After a judgment by default upon a *valued* policy, the plaintiff's title to recover is confessed, and the amount of the damage is fixed in the policy.

Venue.

Origin and progress of that republic.

Introd. xx.

Void Policies.

The name of the person actually interested must be inserted in the policy, or the name of the agent effecting it, *as agent*; otherwise the policy is void.

When the principal resides abroad, the agent so effecting the policy must live in *England.*

But now it is sufficient to insert the name of the person actually interested, or that of the consignor or consignee of the goods, or the names of those receiving the orders to insure, or who shall give directions to effect the insurance.

Policies are rendered void *ab initio*, by the least shadow of fraud or undue concealment.

Cases of fraud with respect to policies, are liable to a three-fold division. 1st, The *allegatio falsi.* 2d. The

suppressio veri; 3d, *Misrepresentation.* The latter, though it happen by mistake, if in a material part, will render the policy void as much as actual fraud.

See title *Fraud.*

Every ship insured must, at the commencement of the insurance, be able to perform the voyage, unless some external accident should happen and if she have a latent defect; wholly unknown to the parties, that will vacate the contract, and the insurers are discharged.

See title *Sea-worthiness.*

Whenever an insurance is made on a voyage expressly prohibited by the common, statute, or maritime law of this country, the policy is void.

See title *Illegal Voyages.*

All insurances upon commodities, the importation or exportation of which is prohibited by law, are void.

See title *Prohibited Goods.*

By statute 19 *Geo. 2. c. 37.* it was declared, that insurances made on ships or goods, *interest or no interest*, or *without further proof of interest than the policy*, or *by way of gaming*, or *wagering*, or without benefit of salvage to the insurer, should be null and void.

See title *Wager Policies.*

It is, by the same statute, declared unlawful to make re-assurance, unless the first assurer should be insolvent, become a bankrupt, or die: in either of which cases such assurer, his executors, administrators, and assigns, might make re-assurance to the amount before by him assured, expressing in the policy that it is a re-assurance.

See title *Re-assurance.*

Wager Policies.

See title *Interest Insurable.*

IN wager policies, the performance of the voyage in a reasonable time and manner, and not the bare existence of

- of the ship or cargo, is the object of the insurance. Page 345
- These policies being contradictor. to the real nature of a policy, which is a contract of indemnity, were originally bad. 346
- They were introduced into England since the Revolution. *ibid.*
- But the courts of justice looked on them with a jealous eye; and the courts of equity still considered them as void. *ibid.*
- Thus a policy was decreed to be delivered up where the insured had no interest in the ship or cargo, except as a lender on bottomry, for which he had a bond. 346, 347
- Where a man had insured goods by agreement valued at 600*l.* and not to be obliged to prove any interest, the Chancellor ordered the defendant to discover what goods he had on board. 347
- The great distinction between interest and wager policies was, that in the former, the insured recovered for the loss actually sustained, whether it was a total or partial loss: in the latter he could never recover but for a total loss. 347
- By the statute of 19 Geo. 2. c. 37. it was enacted, that insurances made on ships or goods, interest or no interest, or without farther proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the insurer, should be null and void. 348
- There is an exception for insurances on private ships of war, fitted out solely to cruize against his majesty's enemies. 349
- It was also provided, that any merchandizes or effects from any ports or places in Europe or America, in the possession of the crowns of Spain or Portugal, may be insured in such way or manner as if this act had not been made. *ibid.*
- This statute has been frequently held not to extend to insurances of foreign property, on foreign ships. 350
- A count in a declaration averring that the plaintiffs, as commissioners appointed by his majesty, under an act of parliament, for the disposal of Dutch ships and effects, made the insurance; and that the said ships, or any of them, were not belonging to his majesty, or any of his subjects, was holden to be good, within the statute. Page 352
- A valued policy is not a wager policy; for he must prove some interest, although he need not prove the value of his interest. 353
- If a valued policy were used merely as a cover to a wager, in order to evade the statute, it would be void. *ibid.*
- An insurance on the profits expected to arise from a cargo of molasses, belonging to the plaintiffs, was held to be good; although there was a clause declaring, "that in case of loss, the profits should be valued at 1000*l.* without any other voucher than the policy." 354
- Profits to arise on the sale of a cargo of goods, an insurable interest. 355
- Commission and privileges of captain in African trade insurable. 356
- When the obtaining of a cargo is only an expectation, the commission of the consignee is not insurable. *ibid.*
- An insurance being made on any of the packet boats that should sail from Lisbon to Falmouth, or such other port in England as his majesty should direct, for one year, upon any kind of goods and merchandizes whatsoever; it was agreed that the goods and merchandizes should be valued at the sum insured, without further proof of interest than the policy. The court held that this was a policy of a mixed nature, and that the insured might recover. 357
- Upon a joint capture by the army and navy, the officers and crew of the ships, before condemnation, have an insurable interest, by virtue of the prize act, which usually passes at the commencement of a war. 358
- So also the commissioners for the care and disposal of Dutch effects have an insurable interest in Dutch ships and effects seized at sea for the purpose of bringing into the ports of this kingdom,

kingdom, and a count averring that they were interested as such commissioners was holden to be good. Page 360

All insurances, made by persons having no interest in the event, about which they insure, or without reference to any property on board, are merely wagers, and are void. 363

Thus where the defendant, in consideration of 20*l.* paid by the plaintiff, undertook that the ship should save her passage to *China* that season, or that he would pay 1300*l.* within one month after the arrival of the said ship in the river *Thames*; the contract was held to be void, although the plaintiff had some goods on board. *ibid.*

The plaintiffs had lent 26,000*l.* on bond, to a captain of an East-India-man, and insured the ship and cargo to that amount, and in case of loss no other proof of interest to be required than the exhibition of the said bond. The contract was held to be void. 355

The third section of the statute relative to insurances, from any ports or places in *Europe* or *America*, in the possession of *Spain* or *Portugal*, is founded on the regulations of those courts; but it is loosely worded. 367

Wages.

No master or owner of any merchant ship shall pay to any seamen beyond the seas, any money on account of wages, exceeding a half of the wages due at the time of such payment, till the ship shall return to *Great Britain* or *Ireland*. 14

Insurances on the wages of seamen are forbidden. 15

Slaves, or any commodity to be received by a sailor in lieu of wages, cannot be insured. *ibid.*

But the captain may insure goods, which he has on board, or his share in the ship, if he be a part owner. *ibid.*

Extraordinary wages paid to seamen during a detention to repair, or a detention by an embargo, cannot be

recovered against the insurers on the ship or cargo. Page 69, 71

2. Whether they are expenses that will fall under the denomination of a general average? 174, 175

Sailors' wages are not liable to contribution in a case of general average. 176

Warranties implied. See title *Seaworthiness*.

Warranty.

A warranty in a policy of insurance, is a condition or a contingency, that a certain thing shall be done, or happen; and unless that is performed, there is no valid contract. 423

It is immaterial for what end the warranty is inserted in the contract; but being inserted it becomes a binding condition upon the insured, and he must shew a literal compliance with it. *ibid.*

It is no matter whether the loss happen in consequence of the breach of warranty or not; for the very meaning of inserting a warranty is to preclude all enquiry about its materiality. 422, 423

But as warranties are strictly construed in order to discharge the underwriter, so also they shall be strictly construed in favour of the insured. 433

It is also immaterial to what cause the non-compliance is to be attributed; for although it might be owing to wise and prudential reasons, the policy is avoided. 424

In this strict and literal compliance with the terms of a warranty consists the difference between a warranty and representation. See title *Fraud*. *ibid.*

In order to make written instructions binding as a warranty, they must appear on the face of, and make a part of the policy. *ibid.*

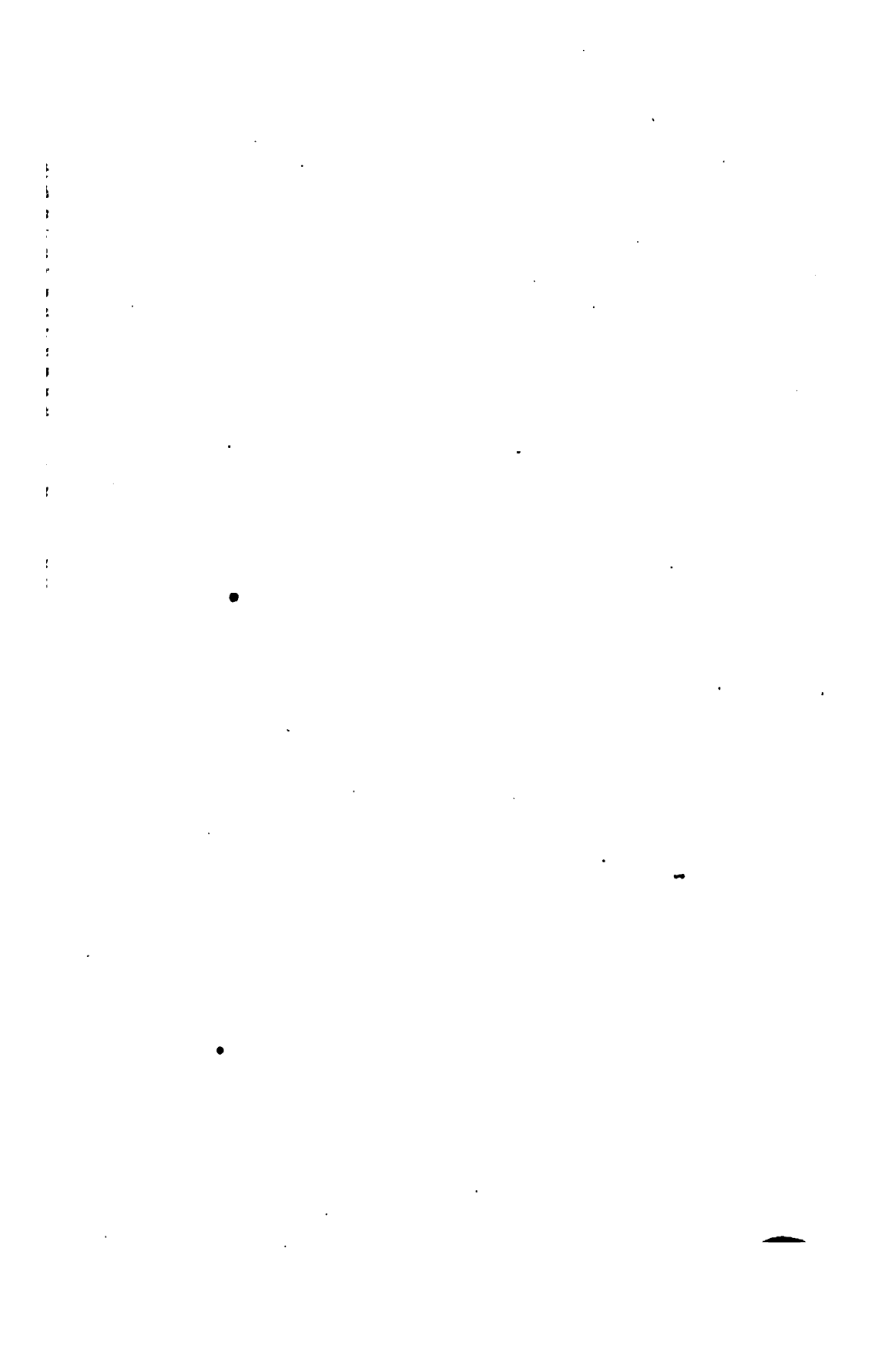
If a policy refer to printed proposals, they are to be considered as part of the policy. 425 note (a)

449 note (a)
Even though a written paper be written up in the policy, and shewn to the underwriters at the time of subscribing, or

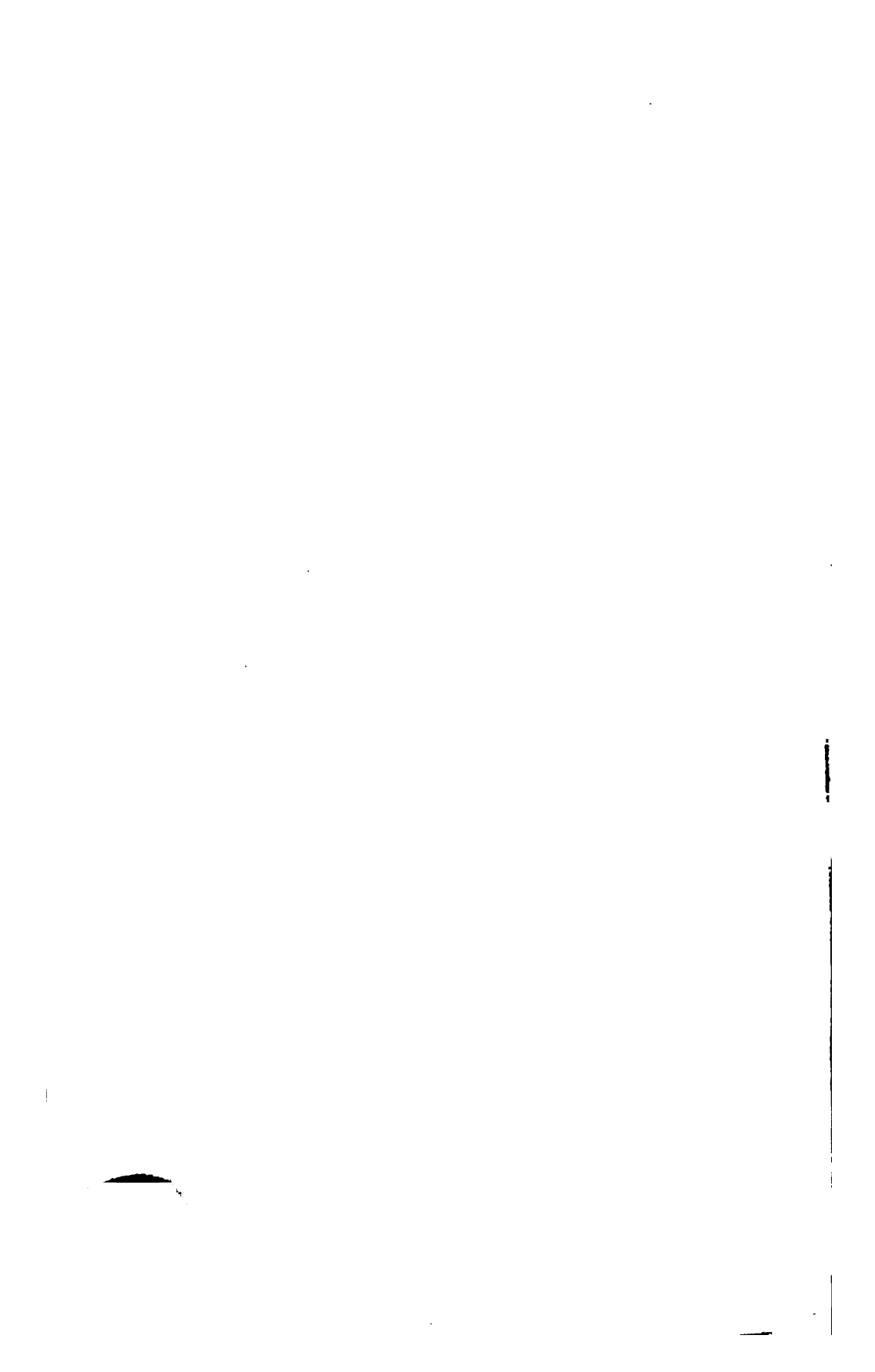
- or even though it be *wesered to the policy*, it is not a warranty but a representation. Page 425
- Thus when evidence was offered to prove that a paper enclosed was always deemed a part of the policy, Lord *Mansfield* refused to hear it. *ibid.*
- A warranty written *in the margin* of the policy is considered to be equally binding, and liable to the same strict construction, as if written on the body of the policy. 425, 426
- Words written transversely on the policy were held to be a warranty. 426
- If a man warrant to sail on a particular day, and be guilty of a breach of that warranty, the underwriter is no longer answerable. 429
- This rule holds though the ship be delayed, for the best and wisest reasons, or even though she be detained by legal force. *ibid.*
- This rule is adopted by foreign writers. 430
- If the warranty be to sail *after* a specific day, and the ship sail before, the policy is equally avoided as in the former case. 430
- Upon a warranty to sail on or before a particular day, if the ship sail before the day from her port of loading, *with all her cargo and clearances on board*, to the usual place of rendezvous at another part of the island, merely for the sake of joining convoy, it is a compliance with the warranty, though she be afterwards detained there by an embargo, beyond the day. 430
- But if her cargo was not complete, it would not be a commencement of the voyage. 431
- When a ship leaves her port of loading, having a full and complete cargo on board, and having no other view but the safest mode of sailing to her port of delivery, her voyage must be said to commence from her departure from that port. 435
- The same doctrine was advanced, even though it was a condition inserted in one of the ship's clearances, that *she should pass by the place* (at which she was detained by the governor beyond the day named in the warranty) to take the orders of government. Page 436
- Thus also an embargo was actually published, before the ship sailed, and the captain immediately after crossing the bar, returned to make a protest, and knowingly sent his ship into the embargo, yet as he swore, that he believed the embargo would be immediately taken off, the underwriter was held liable. 440
- If the insured warrant that the vessel shall depart with convoy and it do not; the policy is defeated and the underwriter is not responsible. 442
- A convoy means a naval force, under the command of that person whom government may happen to appoint. 442, 444
- Regulated by government and usage. 455
- See title *Convoy*.
- Therefore where a ship put herself under the direction of a man of war till she should join the convoy, which had left the usual place of rendezvous before she arrived there; it was held not to be a departure with convoy, although she, in fact, joined, and was lost in a storm. 443
- Aliter*, if such ship was part of the convoy. 445
2. Whether sailing orders from the commander in chief to the particular ships are necessary to constitute a convoy? 446, 447
- A convoy appointed by the Admiral, commanding in chief upon a station abroad, is a convoy appointed by government. 448
- A sailing with convoy from the usual place of rendezvous, as *Spithead* or the *Downs* for the port of *London*, is a departure with convoy, within the meaning of such a warranty. 44, 448
- Although the words used generally are "to depart with convoy," or, "to sail with convoy," yet it extends to sail with convoy throughout the voyage. 449
- But an unforeseen separation from convoy is an accident to which the underwriter is liable. 452
- So held where a ship was separated from her

- her convoy by storm, prevented from rejoining it, and was lost. Page 452
- Even where the ship has, by tempestuous weather, been prevented from joining the convoy, at least so as to receive the orders of the commander of the ships of war, if she do every thing in her power to effect it, it shall be deemed a sailing with convoy. 453
- Otherwise, if the not joining be owing to the negligence and delay of the captain. 454
- As where repeated signals for sailing had been made the night before, and continued next day from 7 till 12; notwithstanding which the ship insured did not sail till two hours after. *ibid.*
- If a man warrant the property to be neutral, and it is not, the policy is void *ab initio*. 459
- In an insurance upon goods, the insured warranted the ship and goods to be neutral; it was expressly found by the jury that they were not neutral. The court therefore, though the loss happened by storms, and not by capture, declared that the contract was void. 460
- The ship of an *American* by birth residing in *England* is not to be considered *American property* within the meaning of a warranty to that effect. *ibid.*
- If the ship and property are neutral at the time when the risk commences, this is a sufficient compliance with a warranty of neutrality. 460, 562
- The insurer takes upon himself the risk of war and peace, Page 451
- If the property be neutral at the time of sailing, and a war break out the next day, the insurer is liable. 452
- How far what is said by the broker when the names of the underwriters are put upon a slip, binds the assured. 473, 616
- As to the effect of the sentence of a foreign court of Admiralty, upon the question of neutrality, see *Admiralty*.
- Of warranty in a life insurance, see title *Lives*.
- Wearing Apparel*
- Do not contribute to a general average. 176
- Wishy, Laws of,*
- An account of them. Introd. xxviii, They mention insurances. Introd. xxix.
- Witnesses.* See *Evidence*.
- Wool.* See *Prohibited Goods*.
- Wreck.*
- In cases of wreck a *reasonable* salvage shall be allowed to those who save the ship, or any of the goods, to be ascertained by three justices of the peace. 181 to 187. 615
- Of felony in cases of wreck, vide title *Felony*.
- Written Clause.*
- The *written clause* in a policy will controul the printed words. 415

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